

# **PROSECUTORIAL DISCRETION: A BALANCING ACT**

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## **DECLARATION OF ORIGINALITY**

I, Kenny Yang, hereby declare that this thesis is my own work and effort and that it has not been submitted anywhere for any award. Where other sources of information have been used, they have been acknowledged.

Kenny Yang

Dated: 1 November 2012

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## **ABSTRACT**

The role of the prosecutor and the exercise of prosecutorial discretion can have an enormous impact on the outcome of criminal proceedings. The exercise of prosecutorial discretion is, however, often secretive and misunderstood. There have been concerns that a lack of accountability and transparency can result in a fertile bed for corruption. Australia has acknowledged this and taken steps to address the issue, but these measures have not come without their own costs.

The concern is that these measures may, if anything, hamper the administration of justice and result in an inefficient criminal justice system. Indeed, these concerns have been noted by Singapore who has hesitated to replicate the Australian position for fear of the inefficiency in the criminal justice system that would inevitably occur.

Accountability and transparency is thus weighed up against the efficient administration of justice. Both are necessary in a functioning criminal justice system, yet each comes at the expense of the other. This can be demonstrated by Professor Herbert Parker's 'Two Models of Criminal Processes' – the Due Process and Crime Control models.

How then does one balance the two competing interests? As this paper will argue, there is no perfect system and a careful examination of a community's cultural values and the objectives of criminal justice system will be necessary to find the appropriate equilibrium in the balancing act of prosecutorial discretion.

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# **PROSECUTORIAL DISCRETION: A BALANCING ACT**

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## **I INTRODUCTION**

In discussions on criminal law, there is ample literature and debate on the role of the Judiciary and the laws passed by the Legislature. What is often forgotten however, is the role the Public Prosecutor<sup>1</sup> plays and the ambit of the prosecutor's discretion in the commencement and conduct of criminal proceedings. While the Legislature and Judiciary are subject to public scrutiny and pegged to standards of transparency and independence, the role of the prosecutor is often not known, and thus slips under the net of such scrutiny.

Indeed, as this paper will argue, the prosecutor often possesses immense discretion that could have a severe impact on criminal proceedings and the accused. As such, there is room for greater transparency and discussion on the issue, but such transparency comes with its own costs. In balancing these competing interests, jurisdictions must find their 'minimum level' – the minimum level of accountability and transparency that society finds acceptable, to instill confidence in the criminal justice system.

This paper will put forward an analysis of the scope of the Public Prosecutor's power in the exercise of their discretion in criminal matters. It will first introduce prosecutorial discretion and its role in the criminal justice system. The paper then seeks to illustrate the nature of prosecutorial discretion by comparing the

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\* LLB (Hons, First Class), GDLP (Australian National University). I'd like to thank Lorraine Finlay at the School of Law, Murdoch University, for her expertise and advice in the production of this paper. All errors are my own.

<sup>1</sup> The precise term used to define the role may differ depending on the jurisdiction. In Australia, prosecutorial functions are carried out by 'State Prosecutors' or 'Police Prosecutors' and are directed by a 'Director of Public Prosecution'. In Singapore, similar functions are carried out by 'Deputy Public Prosecutors' or 'Assistant Public Prosecutors' who assist the Attorney-General in his role as the 'Public Prosecutor'. For the purposes of this paper, the term 'prosecutor' will be used to refer to government officials vested with the authority to initiate and conduct criminal proceedings.

Australian and Singaporean approaches. These two jurisdictions illustrate the two models of criminal process proposed by Professor Herbert Parker in his paper ‘Two Models of the Criminal Process’.<sup>2</sup>

To understand these two approaches the paper will look at the historical developments that resulted in the establishment of independent Director of Public Prosecutions (‘DPP’) in Australia that aims to be independent, fair and accountable. It will also examine the Singaporean system of prosecutions with the Attorney-General constitutionally empowered as the Public Prosecutor.

The paper will then turn to a discussion of how the prosecutorial discretion in Australia has, if anything, grown over the years, especially given the increasing tendency by the legislature to include mandatory sentencing in statutory offences. This displacement of discretion has essentially shifted power from the Judiciary and Legislature to the Executive office of the Public Prosecutor. This can also be seen in Singapore, where the existence of the mandatory death penalty results in the discretion of life and death residing not with the Judiciary, but with the Public Prosecutor.

The second part of this paper will look at the measures Australia has instituted to facilitate transparency and accountability. It will then compare the Australian position with Singapore’s pragmatic model that has traditionally not seen the same attempts at instituting publicly visible safeguards to guide the exercise of the prosecutorial discretion and what benefits this model may offer.

This paper will conclude that the appropriate level of discretion vested in the Public Prosecutor will inevitably require a careful examination of each system’s own values and objectives of its criminal justice system. Each model offers its own benefits, but comes at a cost. No model is perfect and indeed, each system must from time to time calibrate the level of discretion afforded to prosecutors to balance on the one hand, the efficient administration of justice, and on the other, the considerations of transparency and accountability.

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<sup>2</sup> Herbert L Parker, Two Models of the Criminal Process (1964) 113 *University of Pennsylvania Law Review* 1.



## II THE PROSECUTOR'S ROLE IN THE CRIMINAL JUSTICE SYSTEM

### *A Checks and Balances*

Western-liberalists have long accepted that a government with unchecked powers increases the likelihood of abuse of those powers. A system of checks and balances exists to ensure that the powers of the State are exercised appropriately and only when necessary. In the words of Montesquieu, 'there is no liberty, if the judicial power be not separated from the executive and legislative'.<sup>3</sup>

The separation of powers doctrine thus divests state power in three separate branches: the Executive, the Legislature and the Judiciary, each acting 'as the means of keeping each other in their proper places'. While this separation of powers is important in all facets of governance and law, it is arguably even more so in matters of criminal law as this affects the liberty and life of individuals.

It is in the criminal law where one is able to witness the 'fascinating inter-play between the different branches of government'.<sup>4</sup>

The Legislature makes the laws which define what a crime is, and which also prescribes what the processes should be; the Executive runs the enforcement machinery from detection and investigation to prosecution; and the Judiciary adjudicates guilt or innocence, and, if necessary, the punishment, on the material presented to it by the prosecution and the defendant; the Executive once again takes over and carries out the sentence of the court.<sup>5</sup>

From the completion of an offence to conviction and sentencing, the ball of control first starts with the Legislature, made up of elected officials, to define the necessary elements of an offence. It then passes to the Executive for investigation and prosecution and finally to the Judiciary, made up of appointed judicial

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<sup>3</sup> Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans, 1949) 51; James Madison, *The Federalist No 51* (1961) 347.

<sup>4</sup> Michael Hor, 'The Independence of the Criminal Justice System in Singapore' [2002] *Singapore Journal of Legal Studies* 497, 497.

<sup>5</sup> Ibid.

officers who are, in an ideal system, given independence and are thus free from influence of the other two branches. It is the Executive control of this process and, within it, the exercise of the prosecutor's power and discretion that this paper is concerned about.

### *B The Public Prosecutor's Role*

In Australia, prosecutorial functions were traditionally carried out by the Attorney-General. Today, this role has fallen to the Directors of Public Prosecutions of the States and the Commonwealth, through the respective enabling legislation.<sup>6</sup> While the precise term may vary across jurisdictions, there is usually provision for a 'Public Prosecutor',<sup>7</sup> whose primary function is to prosecute offences against the law of the land. In carrying out this duty, the prosecutor has to make certain decisions. This includes whether or not to prosecute, and if so, to choose from the plethora of available charges arising from the same set of facts. The prosecutor also assists the court by making submissions fairly and in an even handed manner,<sup>8</sup> which may include applications on points of the criminal process from pre-trial hearings through to the trial itself, sentencing and appeals on both conviction and sentence, if necessary.<sup>9</sup>

In the exercise of these functions, the prosecutor is meant to act fairly in seeking the truth and to represent the community rather than any individual or sectional interest.<sup>10</sup> While the prosecutor is the adversary of the accused in our adversarial system,<sup>11</sup> the prosecutor as 'minister for justice'<sup>12</sup> is not entitled to act as if representing private interests in litigation. A prosecutor 'acts independently, yet in the public interest'.<sup>13</sup> The role of the public prosecutor is not to push for a

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<sup>6</sup> Rod Harvey, 'The Independence of the Prosecutor: A Police Perspective' (Paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Melbourne, 18 April 1996) 5.

<sup>7</sup> See footnote 1.

<sup>8</sup> *R v Tait and Bartley* (1979) 46 ALR 473, 477; David Ross, *Crime* (Lawbook, 2<sup>nd</sup> ed, 2004) 749.

<sup>9</sup> *R v Allpass* (1993) 72 A Crim R 561.

<sup>10</sup> *Livermore v R* [2006] NSWCCA 334; Eric Colvin and John McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis, 5<sup>th</sup> Ed 2008) 739.

<sup>11</sup> *R v Karounos* (1995) 63 SASR 452, 465-6, 493.

<sup>12</sup> Harvey, above n 6.

<sup>13</sup> Critics have however mentioned that these concepts are 'so diffuse and elastic that they do not constrain prosecutors much', see Stephanos Bibas, 'Prosecutorial Regulations versus Prosecutorial Accountability' (2009) 157 *University of Pennsylvania Law Review* 959, 961.

conviction,<sup>14</sup> but to assist the court in arriving at the truth.<sup>15</sup> A prosecutor does not represent a particular client,<sup>16</sup> but serves the community and, in doing so, must act in the spirit of fairness. To this extent, the accused and the community can expect that the prosecutor ‘will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one’.<sup>17</sup>

### *C Ball Passing*

At a cursory glance, this ‘ball-passing’ of control from one branch of government to the other ensures that each is accountable to the other and reduces the risk of one branch being overly influenced by another. While the Westminster model of governance has accepted that some overlap between the Legislature and Executive cannot be avoided,<sup>18</sup> the Judiciary remains separate and independent. This ensures that the risk of abuse is minimized and the liberty and rights of individuals are protected.<sup>19</sup>

However, upon closer examination, the Executive’s role and specifically, the prosecutor’s position is one of a special nature – it essentially forms the bridge that links the Legislature’s definition of an offence to the Judiciary’s adjudication of guilt or innocence. As the two institutions are independent of each other, it is up to the prosecutor, upon receiving the ‘ball’, to decide when, how, and indeed whether or not to pass said ‘ball’ to the Judiciary for adjudication.

The special position the prosecutor is in is arguably compounded given that the Judiciary in the adversarial common law system, while having final authority in

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<sup>14</sup> Yeo, Stanley, Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2<sup>nd</sup> Ed, 2012) 28.

<sup>15</sup> Colvin and McKechnie, above n 10.

<sup>16</sup> Harvey, above n 6.

<sup>17</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 663. This includes avoiding the use of temperate or emotive language which may prejudice the jury – see *Livermore v R* [2006] NSWCCA 334 where the Court took objection to the prosecution repeatedly referring to a witness as ‘an idiot’, cited in Colvin and McKechnie, above n 10, 740.

<sup>18</sup> Stanley de Smith, *The New Commonwealth and its Constitutions* (Stevens, 1964) 131-149.

<sup>19</sup> Hor, above n 4.

deciding the matter, is only a passive adjudicator,<sup>20</sup> having a limited role in the commencement and conduct of criminal proceedings. For practical and constitutional reasons, it is neither expected, nor desired, that the courts play a more inquisitorial role in an adversarial system.<sup>21</sup> As such, the court can only consider matters that have been brought before it, based on materials presented by both parties.<sup>22</sup> The courts are also constrained in having to deal with the cases before it on a case-by-case basis, affording each the full attention and consideration of the court.<sup>23</sup>

While the prosecutor has some limitations - for example, in Singapore and Australia it is well accepted that a prosecutor should play no role in the investigation of offences and is thus reliant on enforcement and investigative authorities to pursue matters - the prosecutor does play an important role in the pre-trial decision making process and in court. He/she decides whether or not to proceed on charges and which charges to proceed on. If proceeding on a matter, he acts as an advocate before the court, selecting which materials to present and in doing so, is given great leeway in deciding the form of such presentation, or indeed whether the case at hand warrants such presentation.<sup>24</sup> More than a passive receiver of workload, the prosecutor 'screens' cases and decides which are worthy of proceeding on and to what extent. The prosecutor's importance within the criminal justice system cannot be overestimated.<sup>25</sup>

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<sup>20</sup> William A Hamilton and Charles R Work, 'The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness' (1973) 64 *Journal of Criminal Law and Criminology* 183.

<sup>21</sup> Michael A Simons, 'Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization' (2002) 75 *New York University Law Review* 893, 897.

<sup>22</sup> Hamilton and Work, above n 20.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Bibas, above n 13.

## D Prosecutorial Discretion

The Macquarie Dictionary defines discretion as the ‘power or right of deciding, or of acting according to one’s own judgment; freedom of judgment or choice.’<sup>26</sup> In the context of a prosecutor’s discretion, this refers to the wide scope given to commence, conduct, direct, take over and conduct criminal proceedings on behalf of the State, as its advocate.<sup>27</sup> According to Davis:

Discretion is indispensable for the individualization of justice (governments of laws and men). It is necessary as rules alone cannot cope with the complexities of modern government...Where law ends, discretion begins and the exercise of discretion may mean beneficence or tyranny, justice or injustice, reasonableness or arbitrariness.<sup>28</sup>

Whatever its origins, discretion now ‘pervades all facets of the administration of justice’.<sup>29</sup> While it has been accepted that a degree of discretion in decision making is required,<sup>30</sup> these decisions can have a significant impact on a defendant and reverberate through every component of the criminal justice system.<sup>31</sup> They can mean the difference between justice and injustice. Prosecutorial discretion is indeed ‘at the heart of the State’s criminal justice system’.<sup>32</sup>

In a straightforward shoplifting incident for example, where the only offence possible is stealing, the prosecutor may simply have to make a choice whether or

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<sup>26</sup> Susan Butler (ed), *Macquarie Dictionary* (Macquarie, 5<sup>th</sup> ed, 2009) 479; Richard Refshauge, ‘Prosecutorial Discretion – Australia’ in Gabriël A Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21<sup>st</sup> Century* (CopyRight Publishing, 2002) 353, 358. The Concise Australian Legal Dictionary defines discretion as ‘the power or authority of a decision maker to choose between alternatives, or to choose no alternative’, see Peter Butt (ed), *Concise Australian Legal Dictionary* (LexisNexis, 3<sup>rd</sup> ed, 2004) 130.

<sup>27</sup> George T Felkenes, ‘The Prosecutor: A Look at Reality’ (1975) 7 *Southwestern University Law Review* 98, 98.

<sup>28</sup> K Davis, *Police Discretion* (West Publishing, 1975) 12.

<sup>29</sup> Sidney I Lezak and Maureen Leonard, ‘The Prosecutor’s Discretion: Out of the Closet, Not Out of Control’ in Carl F Pinkele and William C Louthan (eds), *Discretion, Justice and Democracy: A Public Policy Perspective* (1985) 44-5.

<sup>30</sup> In the United States, it has been recognized that prosecutorial discretion is a necessary aspect of the justice system, see *United States v Armstrong*, 116 S Ct 1489 (1996); Anne Bowen Poulin, ‘Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after United States v Armstrong’ (1997) 34 *American Criminal Law Review* 1071, 1079.

<sup>31</sup> Felkenes, above n 27.

<sup>32</sup> Kenneth Culp Davis, *Discretionary Justice* (1969) 170. Also cited in *McCleskey v Kemp*, 481 US 279, 297, 312 (1987).

not to proceed with prosecution.<sup>33</sup> However, in more complicated matters where some force has been used in the commission of the offence, the prosecutor has to decide whether to proceed with stealing, robbery (or possibly aggravated robbery).<sup>34</sup> Similarly, in an altercation between individuals where the level of injuries suffered may vary, a number of charges may be open: a common assault,<sup>35</sup> assault occasioning bodily harm,<sup>36</sup> grievous bodily harm<sup>37</sup> and/or wounding.<sup>38</sup> The prosecutor may select from the menu of offences which to proceed with. The prosecutor's discretion can be said to extend to the following: the decision whether or not to commence or continue a prosecution, and if so, which charges should be laid, and decisions as to the conduct of proceedings – which witnesses to call, what material to be presented and a range of other decisions regarding the conduct of the case.<sup>39</sup>

Some discretion must inevitably be vested in the prosecutor. The State's resources are finite and the prosecutor performs a vital function by precluding random access to the courts and to its limited adjudicative resources, preserving these resources for the timely judgment of the matters to which the public attaches priority.<sup>40</sup> It is in this sense that the prosecutor, acting in the interests of the public, serves as guardian, protector and custodian of the community's scarce resources for adjudication.<sup>41</sup> This has been referred to as the '[p]rosecutor's intelligent use of court [and state] resources.'<sup>42</sup> The prosecutor is at the end of the day, a Public Servant, funded by the State and thus has a duty to ensure the

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<sup>33</sup> This scenario was laid out in Yeo, Morgan and Cheong above n 14, 29.

<sup>34</sup> For example, in Western Australia the offence of robbery encapsulates that of stealing, but includes a degree of violence at, during or immediately after the stealing. See *Criminal Code of Western Australia* ss370-1 Cf *Criminal Code of Western Australia* ss 391-2 which stipulates that a person who steals a thing and, immediately before or at the time of or immediately after doing so, uses or threatens to use violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen commits a robbery. See *Criminal Code of Western Australia* s 391 for 'circumstances of aggravation'.

<sup>35</sup> *Criminal Code of Western Australia* ss 222, 313.

<sup>36</sup> *Ibid* s 317.

<sup>37</sup> *Ibid* s 297.

<sup>38</sup> *Ibid* s 301.

<sup>39</sup> Refshauge, above n 26; Michael Rozenes, 'Prosecutorial Discretion in Australia Today' (Paper delivered at the Australian Institute of Criminology Conference: Prosecuting Justice, Melbourne, 18-19 April 1996).

<sup>40</sup> Hamilton and Work, above n 20, 184.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*.

efficient use of tax payer's dollars and State resources.<sup>43</sup> A degree of discretion is necessary to facilitate compromise and expediency in the criminal justice process.<sup>44</sup>

### *E Gate Keeper of the Criminal Justice System*

One would think that criminal trials, having the potential to deprive a defendant of liberty and indeed in some jurisdictions, life, would necessitate a stringent process before conviction, ideally before a jury of the defendant's peers. This notion is however, as some would put it, a 'romantic view' of the criminal law.<sup>45</sup> In reality, most decisions are made before the matter is put to trial.<sup>46</sup> This is the result of the considerable discretion afforded to the prosecutor in the pre-trial decision making process. In practice, this has translated into the outcome of a criminal trial being heavily affected by the decisions of a prosecutor who, in the words of then US Attorney General Robert Jackson, 'has more control over life, liberty and reputation than any other person'.<sup>47</sup> The term 'gate-keeper' of the criminal justice system is thus not an inaccurate label for the prosecutor.<sup>48</sup>

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<sup>43</sup> Vicki Waye and Paul Marcus, 'Australia and the United States: Two Common Criminal Justice System Uncommonly at Odds, Part 2' (2010) 18 *Tulane Journal of International and Comparative Law* 335, 340.

<sup>44</sup> Mark Findlay, *Criminal Law: Problems in Context* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 41.

<sup>45</sup> F Andrew Hessick III and Reshma M Saujani, 'Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel and the Judge' (2002) *Brigham Young University Journal of Public Law* 189, 189.

<sup>46</sup> Findlay, above n 44.

<sup>47</sup> Robert H Jackson, 'The Federal Prosecutor' (1940) 24 *Journal of American Judicature Society* 18. See also comments such as 'no government official...has as much unreviewable power and discretion as the prosecutor' in Bibas, above n 13, and 'no government official can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime' in Kenneth J Melilli, 'Prosecutorial Discretion in an Adversarial System' (1992) 3 *Brigham Young University Law Review* 669, 671.

<sup>48</sup> A phrase referred to by The Justice Committee, United Kingdom House of Commons, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (2009) 3. A number of commentators have also used the term. See Felkenes, above n 27; Federick W Gay, 'Restorative Justice and the Prosecutor' (2000) 27 *Fordham Urban Law Review* 1651; Laurie L Levenson, 'Workingoutside the Rules: The Undefined Responsibilities of Federal Prosecutors' (1999) 26 *Fordham Urban Law Review* 553; Bennett L Gershman, 'A Moral Standard for the Prosecutor's Exercise of the Charging Decision' (1993) 20 *Fordham Urban Law Review* 513; Cassia Spohn and David Holleran, 'Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances and Intimate Partners' (2001) 18 *Justice Quarterly* 651; James C Backstrom, 'The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community' (1999) 50 *South Carolina Law Review* 699.

Given the immense discretion a prosecutor is given in the commencement and conduct of criminal proceedings and its corresponding effect on the accused, it is a strange state of affairs that the role of the prosecutor is often ‘forgotten in discussions of the criminal justice system’.<sup>49</sup> As highlighted in a report by the Australian Institute of Criminology:

[t]he exercise of prosecutorial discretion is one of the most important but least understood aspects in the administration of criminal justice. The considerable discretionary powers vested in prosecutors employed by the state and territory Offices of the Director of Public Prosecutions (DPP) are exercised in accordance with prosecution policies and guidelines, but the decision making process is rarely subject to external scrutiny<sup>50</sup>

Grosman notes that little is known about the powers exercised by prosecutors and the factors which influence their exercise of discretion.<sup>51</sup> Legislative provisions which define the powers, duties and functions of the prosecutor are significantly absent.<sup>52</sup> Judicial pronouncements, if any, are largely confined to the prosecutor’s behavior in the courtroom.<sup>53</sup> This trend, acknowledged by Sallmann and Willis, is a situation disturbing in any society which purports to embrace liberal, democratic principles and ideas.<sup>54</sup> However, in order to better understand the nature of the prosecutor and the independence or lack thereof, of the exercise of its discretion, it is first useful to look at the development of the prosecution service and how it arrived in its current form.

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<sup>49</sup> Hamilton and Work, above n 20.

<sup>50</sup> Denise Lievore, ‘Victim Credibility in Adult Sexual Assault Cases’ [2004] (288) *Trends and Issues in Crime and Criminal Justice* 1.

<sup>51</sup> B A Grosman, *The Prosecutor* (University of Toronto Press, 1969) 3.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Peter Sallmann and John Willis, *Criminal Justice in Australia* (Oxford University Press, 1984) 49.



### III TWO SYSTEMS OF PROSECUTIONS ILLUSTRATED

#### *A The Development of Prosecutions in Australia*

Different legal cultures have developed varying approaches in dealing with individuals who break the laws set down by the State and society.<sup>55</sup> In the trial of Socrates, as depicted in ‘The Crito’, the decision to prosecute Socrates was made by a trio of private citizens: a politician, a poet and a rhetorician.<sup>56</sup> In another well known trial four hundred years later, Pontius Pilate first found no basis for a charge against Jesus but later left his prosecution to a crowd. In various criminal justice systems today, the majority of prosecutions will be State sanctioned, initiated by the State ‘in the public interest’,<sup>57</sup> with official State prosecutors at the helm.<sup>58</sup> In Japan, which does not recognize any offence unless prosecution is undertaken by the State, this has been described as a ‘monopolization of prosecution’.<sup>59</sup> While some jurisdictions make limited provisions for private prosecutions,<sup>60</sup> these are few and far in-between – the reality of the criminal justice system is that prosecution is an arena dominated by the State and its prosecutors.<sup>61</sup>

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<sup>55</sup> Mark West, ‘Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion’ (1992) 92 *Colombia Law Review* 684.

<sup>56</sup> Justin D Kaplan, *Introductory Note to Dialogues of Plato 2* (Jowett trans 1950), cited in West, above n 55.

<sup>57</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 29 January 1951, vol 483, col 681, (Sir Hartley Shawcross, Attorney-General).

<sup>58</sup> Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 57.

<sup>59</sup> Francis Tseng, ‘Enhancement of the Rule of Law and Promotion of the Public Interest – The Role and Function of the Prosecution System in Singapore’ (Paper presented at the 107<sup>th</sup> International Training Course: The Role and Function of Prosecution in Criminal Justice, The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 1 September to 21 November 1997).

<sup>60</sup> In Australia for example, this is provided for by *The Crimes Act 1914* (Cth) s13. In Western Australia, private prosecution has since been discontinued – the Director of Public Prosecutions thus has full conduct of criminal matters in the State, see Western Australia, *Parliamentary Debates*, Legislative Council, 27 Oct 2004, 7328 (Second Reading Speech of the Criminal Procedure Bill 2004). In Singapore, private prosecution can be done by way of a Magistrate’s Complaint, see Subordinate Courts Working Paper Committee, *Complaints to Magistrates* (1999) Subordinate Courts of Singapore

<<http://www.lawnet.com.sg/legal/ln2/comm/PDF/complaints.pdf>>. See also the comments of Yong CJ in *Cheng William v Loo Ngee Long Edmund* [2001] 2 SLR(R) 626 [16]. For British examples, see Richard J Stafford, *Private Prosecutions* (Shaw & Sons, 1989) 181-187; Irving R Kaufman, ‘Criminal Procedure in England and the United States: Comparisons in Initiating Prosecutions’ (1980) 49 *Fordham Law Review* 26, 28, 30 and the *Prosecution of Offences Act 1985* (UK), s6(1) which preserves the power to instigate private prosecutions.

<sup>61</sup> Gans, above n 58.

In Australia, prior to 1982, prosecutions were conducted along the same vein as the English tradition where it was private citizens and the police, acting as citizens and not representatives of the State, who commenced and conducted prosecutions.<sup>62</sup> This however, was not ideal as private prosecutions imposed a significant burden on the private citizen acting as prosecutor.<sup>63</sup> This also led to an element of arbitrariness as whether an offender was ultimately prosecuted depended on the victim's willingness to commence a prosecution. Thus, while the right to initiate private prosecutions remained under the *Crimes Act 1914* (Cth),<sup>64</sup> upon the statutory establishment of a police force, the police took over the vast majority of prosecution of offences.<sup>65</sup>

### 1 *The Call for Separation*

This was however, still unsatisfactory given that the prosecution was often undertaken by the police investigator without reference or consultation with the prosecuting authority.<sup>66</sup> The concept of a police prosecutor is problematic as the person who investigates the crime is seen as having an interest in seeing the case proceed. Also disconcerting was the fact that the prosecution service then was seen to be part of government, giving rise to the question of the independence.<sup>67</sup> The prospect of a prosecution service entirely independent of the government and the police was rare, but one that has been described as being 'eminently sensible if one wanted to remove prosecutions and prosecutorial decisions from the

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<sup>62</sup> According to Williams, '[p]rosecution by private people was frequent and important before the advent of the modern police forces, in periods when it could be asserted that prosecuting for criminal offences was the patriotic duty of all citizens' see D G Williams, 'Prosecution, Discretion and the Accountability of the Police' in R Hood (ed) *Crime Criminology and Public Policy* 32 cited in Justin McCarthy, 'Towards a Public Prosecution System in Australia' (Paper presented at the International Society for the Reform of the Criminal Law Conference: Investigating Crime and Apprehending Suspects: Police Powers and Citizens Rights, Sydney, 19-24 March 1989) 1.

<sup>63</sup> Homer S Cummings and Carl McFarland, *Federal Justice* (1937) 13 cited in Robert L Misner, 'Recasting Prosecutorial Discretion' (1996) 86 *The Journal of Criminal Law and Criminology* 717, 729.

<sup>64</sup> *Crimes Act 1914* (Cth) s 13.

<sup>65</sup> Refshauge, above n 26.

<sup>66</sup> Damian Bugg, 'The Role of the DPP in the 20<sup>th</sup> Century' (Paper presented at the Judicial Conference of Australia, Melbourne, 13 November 1999).

<sup>67</sup> G E Fitzgerald, *Commission of inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 238; Bugg, above n 66.

political process.’<sup>68</sup> Some saw a need to remove the Attorney-General (who until that time was responsible for the commencement and conduct of prosecutions), an elected member of the Legislature, from the prosecution process to ensure true independence from day to day politics of government.<sup>69</sup> As noted by John Coldrey:

[A] major problem exists when the prosecutorial discretion must be exercised in controversial or politically sensitive circumstances. There is a real potential that such decisions will become subject to distortion or misconstruction if they are drawn into the ambit of party political debate or alternatively, will be perceived as having been motivated by political partisanship. It is not to the point that such assertions and perceptions may be factually groundless. The damage that is created is that the necessary public confidence in the administration of the criminal law will be eroded.<sup>70</sup>

In addition to the perceived lack of independence, the prosecution service suffered from a myriad of issues and was accordingly criticized:

In the late 1970s and early 1980s it became increasingly apparent that the Commonwealth prosecution process was fraught with delay and inefficiencies. Matters came to a head with the widespread debate concerning some of the revelations contained in the first Costigan Report. In particular, in that report the Royal Commissioner outlined what he described as the ‘lamentable history of non-prosecution’ which occurred in the Perth Office of the Deputy Crown Solicitor in relation to a ‘bottom-of-the-harbour’ tax prosecution which came to the attention of the Australian Taxation Office almost a decade earlier and still

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<sup>68</sup> Jeremy W Rapke, ‘ODPP Vic 25<sup>th</sup> Anniversary Dinner Speech’ (Speech delivered at the Office of the Director of Public Prosecutions (Victoria) 25<sup>th</sup> Anniversary Dinner, Parliament House, Melbourne, 27 October 2008)

<[http://www.opp.vic.gov.au/resources/2/d/2d61b900404a17b0b434fff5f2791d4a/25th\\_anniversary\\_speech\\_delivered\\_by\\_dpp-27oct08.pdf](http://www.opp.vic.gov.au/resources/2/d/2d61b900404a17b0b434fff5f2791d4a/25th_anniversary_speech_delivered_by_dpp-27oct08.pdf)>. Similar concerns were raised in the UK, see, eg, Great Britain, Royal Commission on Police, *Final Report* (1962).

<sup>69</sup> Jaala Hinchcliffe, ‘A Brief History of the CDPP’ (Speech delivered at the Commonwealth Director of Public Prosecutions 25<sup>th</sup> Anniversary Dinner, Old Parliament House, Canberra, 5 March 2001) <<http://www.cdpp.gov.au/Director/Speeches/20090305jh-a-brief-history-of-the-CDPP.aspx>>.

<sup>70</sup> Geoffrey Flatman, ‘The Office of the Director of Public Prosecutions: Independence Professionalism and Accountability’ (Paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Independence of the Prosecutor, Melbourne, 18-19 April 1996) 2-3.

required prosecution attention. It is also clear that in the federal sphere in recent years crime has become much more complex, and for that reason traditional responses have been rendered inappropriate.<sup>71</sup>

Similarly, in a 1980 report by the Australian Law Reform Commission, it was noted that:

[t]he process of prosecutions in Australia at both State and Federal level is probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice.<sup>72</sup>

This remark, ‘not wide off the mark’,<sup>73</sup> alluded to the lack of consistent, publicly available guidelines and policies to guide the exercise of discretion and power of the prosecutor. The report recommended the establishment of policies to be adopted by prosecutors in the exercise of their discretion whether or not to initiate criminal proceedings and in reviewing and settling charges.<sup>74</sup> The report also recommended that such policies be made publicly available to be ‘reviewed and criticized where appropriate’,<sup>75</sup> for a restructuring of the charging process and for

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<sup>71</sup> Hinchcliffe, above n 69.

<sup>72</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (1980). Similarly, other reports that called for a transfer of prosecutions away from the Police include: Criminal Law and Penal Methods Reform Committee of South Australia, *Second Report on Criminal Investigation* (1974) 174; Lusher, above n 101, 258; New South Wales, Royal Commission into Certain Committal proceedings against KE Humphries, *Report* (1983) 99; Independent Commission Against Corruption, *Investigation into the relationship between Police and Criminals - Second Report* (1994); G E Fitzgerald, *Commission of inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 238, which noted that ‘[t]he employment of experienced police officers as Police Prosecutors absorbs resources which might be better employed on other essential policing duties. It is undesirable that the courts be seen as having to rely upon the Police Force to exercise important discretions in bringing and pursuing charges. This is made worse by any public perception that the Police have special standing or influence in the prosecution process. Independent, legally qualified people could be employed by the Director of Public Prosecutions to conduct prosecutions’; New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol 2, 318 [3.318]; cited in Tony Krone, ‘Police and Prosecution’ (Paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, Mapping the Boundaries of Australia’s Criminal Justice System, Australia Institute of Criminology, Canberra, 22-23 March 1999) 11-12. See also, New South Wales Office of Public Management, ‘Transfer of certain prosecution functions from the police to the Director of Public Prosecutions’ (Report, New South Wales Office of Public Management, 1989); A Sanders, ‘An Independent Crown Prosecution Service’ (1986) 153 *The Criminal Law Review* 16.

<sup>73</sup> Bugg, above n 66.

<sup>74</sup> Australian Law Reform Commission, above n 72, [103].

<sup>75</sup> *Ibid* [107].

the charge bargaining system to be further examined and made more visible.<sup>76</sup> These comments demonstrate the lack of a ‘minimum level’ of transparency and accountability that is necessary if public confidence in the criminal justice system is to be guaranteed.

## *2 The Independent Prosecutor: Fair and Accountable*

Attempts were thus made to establish an independent prosecution service. In Tasmania, this was done via the Crown Advocate under the *Crown Advocate Act*.<sup>77</sup> The Act however, failed to provide guidance on the relationship between the offices of the Crown Advocate, the Attorney-General and the Solicitor-General.<sup>78</sup> Additionally, it did not allow for the Crown Advocate to publish or issue prosecution guidelines which would have ensured some form of consistency and provided guidance in the exercise of prosecutorial discretion to other agencies with prosecution powers.<sup>79</sup> It was only later in Victoria that the Director of Public Prosecutions (‘the DPP’) was born,<sup>80</sup> with most of the Attorney-General’s functions in matters of criminal prosecution transferred to that Office.<sup>81</sup> This was later followed by the establishment of the Commonwealth’s Office of Director of Public Prosecutions through the *Director of Public Prosecutions Act 1983* (Cth).<sup>82</sup>

This was followed by the remaining States each establishing their own DPP under local legislation.<sup>83</sup> The Offices were enacted with powers to commence prosecutions,<sup>84</sup> take over the conduct of prosecutions or terminate prosecutions,<sup>85</sup>

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<sup>76</sup> Ibid 74 [102], 76 [123].

<sup>77</sup> *Crown Advocate Act 1973* (Tas); Bugg, above n 66, 1-2.

<sup>78</sup> Refshauge, above n 26, 354; Bugg, above n 66.

<sup>79</sup> Refshauge, above n 26, 354.

<sup>80</sup> Ibid. John Harber Phillips was appointed as the first Director of Public Prosecutions for Victoria, see Rapke, above n 68.

<sup>81</sup> *Director of Public Prosecutions Act 1982* (Vic).

<sup>82</sup> Refshauge, above n 26, 355. Ian Temby was the inaugural Commonwealth Director of Public Prosecutions.

<sup>83</sup> *Director of Public Prosecutions Act 1990* (NT); *Director of Public Prosecutions Act 1986* (NSW); *Director of Public Prosecutions Act 1991* (SA); *Director of Public Prosecutions Act 1991* (WA); *Director of Public Prosecutions Act 1984* (Qld); *Public Prosecutions Act 1994* (Vic) which replaced the *Director of Public Prosecutions Act 1982* (Vic); see also the *Director of Public Prosecutions Act 1973* (Tas), being the *Crown Advocate Act 1973* (Tas), renamed by amendment.

<sup>84</sup> *Director of Public Prosecutions Act 1983* (Cth) s 6(1)(a), (c), (d); *Director of Public Prosecutions Act 1990* (NT) ss 12, 13; *Director of Public Prosecutions Act 1986* (NSW) s 8; *Director of Public Prosecutions Act 1991* (WA) ss 11(1)(a), 12(1)(a); *Director of Public Prosecutions Act 1984* (Qld) s 10(1)(a); *Director of Public Prosecutions Act 1973* (Tas) s

enter a *nolle prosequi*,<sup>86</sup> but perhaps most importantly, addressing the issue that the Tasmania's earlier experiment did not, the Acts allowed the DPPs to publish guidelines and to give directions to other prosecuting officials.<sup>87</sup> This laid the foundation for an independent prosecution service exercising consistency and transparency in the course of their duties, not least of all in the exercise of their prosecutorial discretion. The objective of establishing the Office of the DPP can be seen in a comment made by Kirby P:

What is the object of having a Director of Public Prosecutions? Obviously it is to ensure that a high degree of independence in the vital task of making prosecution decisions in exercising prosecution discretion... Decisions to commence, not to commence or to terminate a prosecution are made independently of the courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by Parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.<sup>88</sup>

Kirby's comment referred to the political independence (or lack thereof) of the prosecution service and the desire for a less 'secretive, poorly understood'<sup>89</sup>

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12(1)(a)(i); *Public Prosecutions Act 1994* (Vic) s 22(1); *Director of Public Prosecutions Act 1991* (SA) s 7(1)(i).

<sup>85</sup> *Director of Public Prosecutions Act 1983* (Cth) s9(5); *Director of Public Prosecutions Act 1990* (NT) ss 13(b), (c); *Director of Public Prosecutions Act 1986* (NSW) s 9; *Director of Public Prosecutions Act 1991* (WA) ss 11(1)(b), 12(1)(b); *Director of Public Prosecutions Act 1984* (Qld) s 10(1)(c)(ii); *Director of Public Prosecutions Act 1982* (Vic) s 22(1)(b)(ii); *Director of Public Prosecutions Act 1973* (Tas) s 12(1)(a)(ii); Notably, the *Director of Public Prosecutions Act 1991* (SA) gives no express provision but relies on the incidental power of the act s 7(1)(i).

<sup>86</sup> 'Declining to proceed'. *Director of Public Prosecutions Act 1983* (Cth) s 9(4); *Criminal Code Act* (NT) ss 297A, 302; *Criminal Code* (WA) s 581; *Criminal Code* (Qld) s 563; *Public Prosecutions Act 1994* (Vic) s 25; *Director of Public Prosecutions Act 1973* (Tas) s 16; *Director of Public Prosecutions Act 1991* (SA) s 7(1)(e); Notably, in NSW there is not statutory equivalent, but the inherent power may be found under general law per *R v Jell*; *Ex Parte Attorney-General* (Qld) [1991] 1 Qd R 48, 57-59.

<sup>87</sup> *Director of Public Prosecutions Act 1983* (Cth) ss7, 11; *Director of Public Prosecutions Act 1990* (NT) ss 24(b), 25; *Director of Public Prosecutions Act 1986* (NSW) ss 13, 16; *Director of Public Prosecutions Act 1991* (WA) ss 23, 24; *Director of Public Prosecutions Act 1984* (Qld) ss 11(1)(b), (b); *Public Prosecutions Act 1994* (Vic) ss 26, 27; *Director of Public Prosecutions Act 1973* (Tas) s 16; Notably, the *Director of Public Prosecutions Act 1991* (SA) gives no express provision but relies on the incidental power of the Act s 7(1)(i).

<sup>88</sup> *Price v Ferris* (1994) 34 NSWLR 704, 708 (Kirby P). Kirby P also made reference to the Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (1980) in his remarks.

<sup>89</sup> Australian Law Reform Commission, above n 72, 61.

process in prosecution, given the impact the exercise of prosecutorial decision has on stakeholders within the criminal justice system. These factors thus culminated into the Office of the DPP with the notion that the conduct of prosecutions in Australia would be independent, fair and accountable.<sup>90</sup>

### 3 *The Hybrid System: A Compromise?*

Despite the historical developments outlined above depicting a clear desire for an independent and impartial prosecution services, legally qualified practitioners employed by the Office of the DPP are only deployed in serious matters, before superior Courts.<sup>91</sup> In minor matters such as thefts, drink driving and minor assaults before the lower courts, the majority of prosecutions are still being conducted by police prosecutors,<sup>92</sup> who may have some training in law and advocacy,<sup>93</sup> but need not necessarily be legally qualified.<sup>94</sup>

Commentators have noted the oddity of this system,<sup>95</sup> citing several obvious inherent weaknesses. The paralegal police prosecutor, not legally qualified, is not subject to the ethical standards that govern those admitted to the bar.<sup>96</sup> Similarly, as non-legal practitioners, they are unable to claim professional privilege over

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<sup>90</sup> Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008) <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>; Bugg, above n 66; John McKechnie, 'Directors of Public Prosecutions: Independent and Accountable' (1996) 26 *University of Western Australia Law Review* 266. See the Director of Public Prosecutions (NSW) Bill Second Reading Speech, 'The high status of the Director's position, and the security of tenure provided, will ensure that the Director is freed from any suggestion or appearance that he or she is open to political pressure. There will be no reason to fear that the Director may make decisions to curry favour with the Government of the day, in order to secure reappointment or advancement', New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1986, 7343 (Terence Sheahan).

<sup>91</sup> Waye and Marcus, above n 43, 346. See *Director of Public Prosecutions Act 1983* (Cth); *Director of Public Prosecutions Act 1986* (NSW); *Director of Public Prosecutions Act 1991* (NT); *Director of Public Prosecutions Act 1991* (SA); *Director of Public Prosecutions Act 1991* (WA); *Director of Public Prosecutions Act 1994* (Vic); *Director of Public Prosecutions Act 1973* (Tas). See also Colvin and McKechnie, above n 10, 694.

<sup>92</sup> Except for the Australian Capital Territory. Refshauge, above n 26, 356; Waye and Marcus, above n 43, 347; Harvey, above n 6.

<sup>93</sup> J Hunter, C Cameron and T Henning, *Litigation Volume II: Evidence and Criminal Process* (LexisNexis, 7<sup>th</sup> Ed, 2005) 716.

<sup>94</sup> Refshauge, above n 26, 356.

<sup>95</sup> Duncan Chappell and Paul Wilson, *The Australian Criminal Justice System: The Mid 1980s* (Butterworths: 1986) 1-17; Waye and Marcus, above n 43, 347.

<sup>96</sup> Waye and Marcus, above n 43, 347; New South Wales, Royal Commission into the New South Wales Police, *Final Report* (1997) vol 2.

their communications.<sup>97</sup> Furthermore, prosecutorial functions risk being tainted by corruption that has on occasion, surfaced within the police service.<sup>98</sup> Additionally, the issue of competence and training can be called into question. While some measures have been taken to ensure competency in prosecution at trial,<sup>99</sup> the training currently provided for the police prosecutor is inadequate and only allows for a few weeks to learn the fundamentals of prosecuting and the legal system, with much of the work to be learned on-the-job.<sup>100</sup>

The question of independence has also not been resolved. As the Lusher report notes,<sup>101</sup> even if police prosecutors were legally qualified, it would still be inappropriate for them to conduct prosecutions as it breaches the principle of independence.<sup>102</sup> By combining the functions of policing, investigation and prosecution, it becomes harder to dispel the belief that everyone who is apprehended by the police for a criminal offence will be prosecuted.<sup>103</sup> The concern here is as much with impartiality as the *appearance of impartiality*,<sup>104</sup> which is greatly diminished if the police continue to have a role in the conduct of prosecutions.

While it was envisioned that the respective DPPs would have broad powers over prosecutions, these were not without limit. Initially in Western Australia, the wording of section 12 of the *Director of Public Prosecutions Act 1991* (WA)

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<sup>97</sup> Waye and Marcus, above n 43, 347. This paper of course, is not the place for a lengthy discussion on legal professional privilege.

<sup>98</sup> See especially Independent Commission Against Corruption, *Investigation into the relationship between Police and Criminals - Second Report* (1994), 112, which outlines one case where a police prosecutor accepted money to withhold a defendant's true criminal record.

<sup>99</sup> Ken Drew, 'The New South Wales Police Prosecutor', in Julia Vernon Regan (ed) *Improving Access to Justice: The Future of Paralegal Professionals* (1992) 103, 105 for a list of measures, including in-house training methodologies and database of case law digests made available for the police prosecutor.

<sup>100</sup> John Murray, 'The Paralegal Police Prosecutor – For How Long?' in *Improving Access to Justice: The Future of Paralegal Professionals* 105 (Julia Vernon Regan eds 1992) 98.

<sup>101</sup> E A Lusher, *Commission to Inquire into New South Wales Police Administration* (1988) 255-256.

<sup>102</sup> Chris Corns, 'Police Summary Prosecutions: The Past, Present and Future' (Paper presented at the Australian Institute of Criminology History of Crime, Policing and Punishment Conference, Charles Stuart University, Canberra, 9-10 December 1999) 10.

<sup>103</sup> Peter Sweeny, 'The Role of the Police Prosecutor in the Magistrates Court System' in Ivan Potasa (ed) *Prosecutorial Discretion* (Australian Institute of Criminology, Seminar Proceedings No 6, 1984) 135, 143 cited in Krone, above n 72, 4.

<sup>104</sup> New South Wales, Royal Commission into the New South Wales Police, *Interim Report* (1996) 127; Corns, above n 102.



made no provision permitting the DPP to conduct summary prosecutions, leaving this area exclusively to the police. This has since been amended by inserting section 11 to allow the DPP to commence and conduct the prosecution of any offence, whether indictable or not.<sup>105</sup>

Similarly, in Queensland, under the *Director of Public Prosecutions Act 1984* (Qld), ‘criminal proceedings are defined to mean proceedings on indictment and certain proceedings in the Supreme Court commenced by a person charged with an indictable offence’.<sup>106</sup> Thus, while the DPP is empowered to commence, institute and conduct criminal proceedings at the indictable level, and where necessary, take over and conduct proceedings at the summary level,<sup>107</sup> these powers, as Refshauge points out, do not extend to initiating prosecutions at the summary level.<sup>108</sup>

To the credit of the Directors of Public Prosecution, and the police, despite this ‘hybrid system’, the integrity and independence of the Australian prosecution service from the governmental politics and police tampering is preserved. Unflinching prosecution of high profile political bribery matters helped reassure the community that prosecution was undertaken by officers who were not susceptible to political influence.<sup>109</sup> For example, in 1992, just two days after the *Director of Public Prosecutions Act 1991* (WA) was passed, John McKechnie, the then DPP for Western Australia, initiated contempt proceedings against a serving Minister in the Lawrence Government.<sup>110</sup> Additionally, McKechnie noted the Western Australian prosecution service have since prosecuted at least two former Premiers (Liberal and Labor), a former Deputy Premier and Member of Parliament, and a number of police officers.<sup>111</sup> These acts, particularly so early into the new experiment of the independent Office, were courageous acts but proper ones that arguably set the right tone for subsequent years, conceiving a

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<sup>105</sup> Explanatory Memorandum, Director of Public Prosecutions Amendment Bill 2004 (WA).

<sup>106</sup> *Director of Public Prosecutions Act 1984* (Qld) s4.

<sup>107</sup> *Ibid.*

<sup>108</sup> Refshauge, above n 26, 356. Similarly, Refshauge also notes that the powers of the Director to direct police prosecutions in Victoria is somewhat limited, 357 (footnote 41).

<sup>109</sup> Bugg, above n 109.

<sup>110</sup> *R v Pearce* (1992) 7 WAR 395; McKechnie, above n 90, 270.

<sup>111</sup> McKechnie, above n 90.

prosecution service ‘free from the shackles of the past and from political and other influences, including that of the police’.<sup>112</sup> They demonstrated that the DPP would not shy away from initiating prosecutions unpopular with the government of the day.

In Western Australia, the DPP operates a small team of five prosecutors within the Police Prosecuting Division.<sup>113</sup> Headed by a Consultant State Prosecutor,<sup>114</sup> the team handles a range of complex matters within the Magistrates Court jurisdiction.<sup>115</sup> This is a step towards remedying the situation but while there have been a number of attempts to transfer the functions of prosecution from the police to the DPP,<sup>116</sup> at time of writing a full-scale transfer has yet to occur. This may simply be due to a lack of resources. Michael Rozenes, the then Commonwealth Director of Public Prosecution, noted the restrictions on the authority of the DPP on the initiation and conduct of prosecutions before summary courts, further stating that ‘even if a DPP was minded to become involved in prosecutions before the summary courts, often the Office simply did not have the funds to do so’.<sup>117</sup> As noted above, police prosecutors are not subject to the same professional obligations as a legal practitioner admitted to the bar. This however, according to, John Murray,<sup>118</sup> has its benefits. Police prosecutors often undertake their high volume of work in the conduct of a trial with minimal or no preparation.<sup>119</sup>

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<sup>112</sup> Ibid.

<sup>113</sup> Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 12.

<sup>114</sup> Consultant State Prosecutors are the most experienced prosecutors in the Office and are allocated the most complex legal matters. They report directly to the Deputy Director of Public Prosecutions. See Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 10.

<sup>115</sup> Ibid.

<sup>116</sup> In 2006 the Western Australia Police Commissioner announced a desire to move prosecution functions away from the police, ‘WA Commissioner wants to get rid of police prosecutors’, *AAP General News Wire* (Sydney), 20 Oct 2006, 1; In 2008, Robert Cock, the DPP of WA began discussions to take over the role of the police prosecutors, after a successful cost neutral pilot trial in the Children’s Court, Debbie Guest, ‘WA’s Police Prosecutors could lose role’, *The Australian*, 24 Oct 2008; In 2010, Joe McGrath, upon his appointment as DPP of WA, announced plans to take over police prosecutions in the Magistrate’s Court, Todd Cardy, ‘Lawyers to Replace Police Prosecutors’, *The Sunday Times*, 3 April 2010. So far, none of these announcements have amounted to a full transfer of prosecutorial functions from the police to the DPP.

<sup>117</sup> Rozenes, above n 39, 2-3.

<sup>118</sup> John Murray was Chief Superintendent and Officer in Charge of the Prosecution Services of the South Australian Police Department.

<sup>119</sup> Murray, above n 100, 99.

Legally qualified practitioners, under their ethical obligations,<sup>120</sup> may not be so inclined to do so.<sup>121</sup> Police prosecutors are not subject to such obligations and are furthermore working in a quasi-military hierarchy, which allows for the direction of police prosecutors to undertake a high workload with little or no preparation.<sup>122</sup> Murray estimates that a full transfer of prosecutorial functions from the police to the DPP would necessitate an increase of staff in the order of 4:1.<sup>123</sup> As such, the retention of police prosecutors, though at the risk of prosecutions being criticized as not being impartial, is the result of practical necessity.

### *B The Prosecution System in Singapore*

Prosecutions in Singapore come under the control and direction of the Attorney-General. Singapore does not have the separate statutory Office of a DPP; the role of Public Prosecutor is vested in the Attorney-General, as provided for in Article 35 of Singapore's Constitution,<sup>124</sup> and prosecutorial functions and prosecutorial discretion 'vests and vests exclusively' within that Office.<sup>125</sup> The *Criminal Procedure Code* supplements this, stating that 'the Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings under this Code or *any other written law*'.<sup>126</sup> He is assisted in this role by Deputy Public Prosecutors appointed under section 11(3) of the *Criminal Procedure Code*,<sup>127</sup> from legally qualified persons in the Legal

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<sup>120</sup> See *Legal Profession Conduct Rules 2010* (WA) r 7(f)-(g) which states that '[a] practitioner must...not accept an engagement which is beyond the practitioner's competence; and not accept an engagement unless the practitioner is in a position to carry out and complete the engagement diligently'. See also *Legal Profession Conduct Rules 2010* (WA) r 6 (2) which states that '[a] practitioner must not engage in conduct that demonstrates that the practitioner is not a fit and proper person to practice law or may be prejudicial to, or diminish public confidence in, the administration of justice; or may bring the profession into disrepute'. Other States in Australia have similar provisions in their professional conduct rules.

<sup>121</sup> Murray, above n 100, 99 which noted that when DPP lawyers were on a guided tour of the Adelaide Police Prosecution Service, and upon examination of a number of briefs before police prosecutors, many opined that they would be reluctant to prosecute because of the limited information available.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Constitution of the Republic of Singapore* (Singapore) art 35.

<sup>125</sup> Hor, above n 4, 509.

<sup>126</sup> *Criminal Procedure Code* (Singapore, cap 68, 2012 rev ed) s 11 (emphasis added).

<sup>127</sup> *Ibid* s 11(3).

Branch of the Singapore Legal Service,<sup>128</sup> deployed to the Attorney-General's Chambers ('AGC'). The Public Prosecutor also has ultimate responsibility for the conduct of prosecutions handled by prosecuting officials throughout various government Ministries and Departments.<sup>129</sup> These prosecutors need not necessarily be legally qualified, though they are usually supervised by more senior officers who would usually be legally qualified.<sup>130</sup> Where the matter involves a complex question of law or fact, the help of the AGC is sought.<sup>131</sup> In order to ensure consistency of prosecution across the various enforcement agencies, the Ministry Prosecutions Directorate was formed in 2011 and allows for the AGC to monitor and train lay prosecutors.<sup>132</sup> As is the case in Australia, save for a few exceptions,<sup>133</sup> neither the Attorney-General nor his/her Deputies are involved in investigations to ensure the separation of functions.<sup>134</sup> Such investigations are appropriately left with the various investigative or enforcement agencies.<sup>135</sup>

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<sup>128</sup> For a brief history of the Legal Service in Singapore see Wong Kok Weng and Sia Aik Kor, 'A History of the Singapore Legal Service' in Kevin Y L Tan (ed) *Essays in Singapore Legal History* (Marshall Cavendish, 2005) 73-91.

<sup>129</sup> For example, the Legal Services Department in the Ministry of Manpower is charged with enforcing the various pieces of employment and workplace legislation such as the *Work Injury Compensation Act* (Singapore, cap 354, rev ed 1985), the *Employment of Foreign Manpower Act* (Singapore, cap 91A, rev ed 2009), the *Immigration Act* (Singapore, cap 133, rev ed 2008), the *Workplace Safety and Health Act* (Singapore, cap 354A, rev ed 2009) and the *Employment Act* (Singapore, cap 91, 2009). Attorney-General Chambers, *Annual Report 2010/2011* <<http://www.agc.gov.sg/aboutus/documents/AGC2010-2011.pdf>> 47; Ministry of Manpower, *Legal Services Department* (21 September 2012) <<http://www.mom.gov.sg/aboutus/divisions-statutory-boards/Pages/legal-services-department.aspx>>.

<sup>130</sup> For example, Prosecuting Officers in the Legal Services Department of the Ministry of Manpower need not be legally qualified but are overseen by a Director and two Deputy-Directors, all of whom are legally qualified, drawn from the senior ranks of the Singapore Legal Service.

<sup>131</sup> Tseng, above n 59, 104.

<sup>132</sup> Attorney-General Chambers, *Annual Report 2010/2011* <<http://www.agc.gov.sg/aboutus/documents/AGC2010-2011.pdf>> 47.

<sup>133</sup> For example, in corruption cases, the Public Prosecutor may authorize the Director of the Corrupt Practices Investigation Bureau or any police officer to investigate the accounts of suspects in a corruption case, see Tseng, above n 59, 104.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

## 1 *Independence of the Public Prosecutor*

The obvious issue, and one that Australia has arguably resolved with the statutory Office of the DPP, is the independence and separation of the Singapore's Attorney-General's prosecutorial functions and his/her role as Legal Advisor to the Government.<sup>136</sup> A key safeguard to ensure such independence is found in Article 35 of Singapore's Constitution, which offers protection almost as extensive as the Judiciary's.<sup>137</sup> The Public Prosecutor can only be removed by a tribunal of the Chief Justice and two Supreme Court judges, with the Prime Minister's recommendation,<sup>138</sup> a process similar to a judge,<sup>139</sup> and then only for misbehavior or inability to discharge his functions.<sup>140</sup>

The appointment process is also similar to judicial appointments with the Prime Minister constitutionally obliged to consult with the Chief Justice, the incumbent Attorney-General and the Chairman of the Public Service Commission before proposing a candidate.<sup>141</sup> The President of Singapore acts as an additional safeguard and may refuse to appoint a candidate proposed if unconvinced of the candidate's suitability.<sup>142</sup> Additionally, following appointment the terms of the appointment may not be altered disadvantageously.<sup>143</sup>

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<sup>136</sup> *Constitution of the Republic of Singapore* (Singapore) art 35(7) states that:

It shall be the duty of the Attorney-General to advise the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President or the Cabinet and to discharge the functions conferred on him by or under this Constitution or any other written law.

There has been at least one suggestion that Singapore should consider splitting the Office of the Attorney-General to ensure true independence and separation of functions, see K C Vijayan, 'Attorney-General's Job Better Split in Two?', *The Straits Times* (Singapore), 13 May 2012 which raised the issue and noted the Australian approach to the matter.

<sup>137</sup> *Constitution of the Republic of Singapore* (Singapore) art 35; Hor, above n 4, 509-511.

<sup>138</sup> Ibid; Bala Reddy, 'The Rule of Law and the Independence of the Public Prosecutor', (Paper presented at the World Summit of Prosecutors General, Attorneys General and Chief Prosecutors, The Prosecutor General – Pillar of the Contemporary Criminal Justice System, Bucharest, Romania, 23-25 March, 2009).

<sup>139</sup> The removal of a superior court judge requires five superior court judges - see Hor, above n 4, 509-511.

<sup>140</sup> Reddy, above n 138.

<sup>141</sup> *Constitution of the Republic of Singapore* (Singapore) art 35(2).

<sup>142</sup> Ibid art 22; Reddy, above n 138.

<sup>143</sup> *Constitution of the Republic of Singapore* (Singapore) art 35(12)-(13); Hor, above n 4, 509-511.

## 2 Internal Processes and Safeguards

The AGC adopts a system of internal processes where each case handled by a Deputy Public Prosecutor is overseen by a panel of three or more senior Deputy Public Prosecutors who make a recommendation and then pass it through the Head (or Deputy Head) of the Division, who then in turn add their suggestion and passes it to the Attorney-General for the final decision.<sup>144</sup> In this manner, prosecutorial discretion is not left to the whim of a single prosecutor and allows for the Attorney-General to receive the benefit of at least two levels of advice within the AGC.<sup>145</sup> Similarly, it has been said that internal guidelines have been established and are often referred to and the factors that might be taken into consideration include 'the interests of the victim, the accused person and society as a whole'.<sup>146</sup> Presumably, this can be taken to include a consideration of whether a conviction is necessary for the purposes of retribution, denunciation, deterrence (specific or general) or the protection of the public.<sup>147</sup> If a conviction is deemed unnecessary, then the accused may be let off with a warning,<sup>148</sup> or a composition of the offence if appropriate.<sup>149</sup> Ultimately though, there are no publicly available guidelines in Singapore. This leaves much to be desired in terms of public scrutiny, accountability and transparency and is in sharp contrast to the Australian position where Prosecution Guidelines are readily available to members of the public (elaborated on later).<sup>150</sup>

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<sup>144</sup> Tseng, above n 59, 104, 108-109.

<sup>145</sup> K C Vijayan, 'AGC: Robust reviews before discretion is exercised', *The Straits Times* (Singapore), 21 January 2012.

<sup>146</sup> Ibid.

<sup>147</sup> These factors were noted by former Attorney-General Walter Woon at a public lecture in 2008, available at Walter Woon, 'Crime and Punishment: The Problems of Sentencing' (2009) 27 *Singapore Law Review* 1, 9.

<sup>148</sup> Ibid.

<sup>149</sup> A 'composition' or 'compounding' refers to a process where the victim and offender agree to resolve the matter through a payment of money rather than proceeding to prosecution, see Yeo, Morgan and Cheong above n 14, 31. See also *Public Prosecutor v Norzian bin Bintat* [1995] 3 SLR(R) 105 and *Kee Leong Bee v Public Prosecutor* [1999] 2 SLR(R) 768 for judicial discussion on the composition of offences.

<sup>150</sup> See page 61 of this paper.

### C *The Independence Conundrum*

The two system's markedly different approaches brings to light the independence conundrum – balancing the need to ensure that the Public Prosecutor is free from political influence and the need to ensure a degree of accountability. Some commentators have noted that Australia's eagerness to de-politicize the prosecution service has its disadvantages, including limited grounds for judicial review<sup>151</sup> and near nonexistent parliamentary oversight.<sup>152</sup> Australia thus walks a fine line between allowing the DPP sufficient independence but ensuring that there is at least some oversight of the Director's duties, given that the Office is an unelected one, unanswerable to any constituents. This brings up the question of independence versus accountability, as evinced by one report:

It would defy the principles of responsible, democratic government if the Attorney-General were to abdicate totally his responsibility for such an important area of government, in favour of a person who is not elected, and thus not answerable to Parliament or the community. However, it is proper, in order to facilitate a more efficient and consistent prosecution policy, and to provide for what is perceived as a more independent decision-making process, that the Government should give authority to a person to exercise these powers on a day-to-day basis.<sup>153</sup>

The Australian solution it would seem, transfers the prosecutorial functions of the Attorney-General to the DPP,<sup>154</sup> but still allows for the retention of the residual

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<sup>151</sup> Judicial review of prosecutorial discretion is limited to rare cases where an abuse of process can be established. See *Maxwell v The Queen* (1996) 184 CLR 501, 513-14. Otherwise, '[d]ecisions to commence, not to commence[,] or to terminate a prosecution are made independently of the courts', *Price v Ferris* (1994) 34 NSWLR 704, 708 (Kirby P). The High Court has stated in *The King v Weaver* (1931) 45 CLR 321, 334 that '[i]t is entirely a matter for the law officers of the Crown to determine the form of prosecution, and for the Court to determine whether the charge made had been supported'.

<sup>152</sup> E Campbell and H Whitmore, *Freedom in Australia* (Sydney University Press, 1973) 104 where it is suggested that judicial supervision of prosecutions is minimal and Parliamentary control almost nonexistent; Refshauge, above n 26; Waye and Marcus, above n 43, 348.

<sup>153</sup> Johns Rowena, Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey' (Briefing Paper 9/2001, Parliamentary Library, New South Wales, 2001) 14.

<sup>154</sup> *Director of Public Prosecutions Act 1983* (Cth) s 6(1)(a), (c), (d), 9(5); *Director of Public Prosecutions Act 1990* (NT) ss 12, 13; *Director of Public Prosecutions Act 1986* (NSW) ss 8, 9; *Director of Public Prosecutions Act 1991* (WA) ss 11, 12; *Director of Public Prosecutions Act 1984* (Qld) s 10; *Director of Public Prosecutions Act 1973* (Tas) s 12(1)(a); *Public Prosecutions Act 1994* (Vic) s 22(1); *Director of Public Prosecutions Act 1991* (SA) s 7(1)(i).

power of the Attorney-General as the ‘First Law Officer’.<sup>155</sup> This additionally encompasses several obligations including the furnishing of an annual report to the Attorney-General with respect to the operations of the Office.<sup>156</sup> The Attorney-General is further required to provide a copy of that report to each House of Parliament within fifteen sitting days of receiving the report.<sup>157</sup> The system is however, still anxious to keep the Director independent from the Attorney-General. This insistence on a separation of prosecutorial function and day to day politics, it would seem, is not just an Australian concern. In the UK House of Commons, it was expressed by Sir Harley:

That was the view that Lord Birkenhead once expressed on a famous occasion, and Lord Simon stated that the Attorney-General: ‘...should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute...’ I would also add to that that he should also decline to receive orders that he should not prosecute: That is the traditional and undoubted position of the Attorney-General in such matters...<sup>158</sup>

John McKechnie notes that express provisions in the Western Australian Act preclude the Attorney-General from giving directions in any particular case, confining his power to issuing directions as to general policy.<sup>159</sup> In Western Australia, section 27(2) of the Act makes it clear that the Attorney-General may not issue directions in respect of a particular case,<sup>160</sup> with similar provisions in several other jurisdictions within Australia.<sup>161</sup>

While, the Commonwealth *Director of Public Prosecutions Act* allows for the Attorney-General to give directions to the DPP in general matters as well as

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<sup>155</sup> Commonwealth Director of Public Prosecutions, above n 90, 4 [1.2]; Damian Bugg, ‘Accountability, Independence and Ethics in the Prosecution Practice’ (Paper delivered at the International Society for the Reform of Criminal Law 18<sup>th</sup> Annual Conference: Keeping Justice Systems Just and Accountable – A Principled Approach in Challenging Times, Montreal, 8 August 2004).

<sup>156</sup> Damian Bugg, ‘The Independence of the Prosecutor and the Rule of Law’ (Paper presented at the Rule of Law: The Challenges of a Changing World, Brisbane, 31 August 2007).

<sup>157</sup> *Director of Public Prosecutions Act 1983* (Cth) s 33.

<sup>158</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 29 January 1951, vol 483, col 681-687.

<sup>159</sup> McKechnie, above n 90, 275.

<sup>160</sup> *Director of Public Prosecutions Act 1991* (WA) s 27(2).

<sup>161</sup> *Director of Public Prosecutions Act 1984* (Qld) s10A(2); *Director of Public Prosecutions Act 1990* (NT) s28(2); *Director of Public Prosecutions Act 1986* (NSW) s26 (3).



individual cases,<sup>162</sup> the direction must first be discussed, given in writing and subsequently tabled in Parliament and gazetted.<sup>163</sup> The then Director Damian Bugg noted that in the twenty-three years since 2007, only four directions have been given.<sup>164</sup> None of the directions related to individual matters,<sup>165</sup> and none interfered with the independence of the Commonwealth DPP.<sup>166</sup> This demonstrates an adherence to the notion that the Attorney-General, despite having final authority, should be slow to interfere with the Director's prosecutorial functions.

However, the Office of the DPP also has its own problems. The role of the DPP is an appointed one, and while the Office bearer in theory has independence, at least for the duration of the appointment, the term of the appointment is not consistent throughout Australia. The term of the Office can range from 5 years (Western Australia), to a duration to be determined by the Governor/Governor-in-Council or the instrument of appointment.<sup>167</sup> In New South Wales, the term of Office was initially a lifetime appointment, until Parliament amended this.<sup>168</sup> While these measures do not apply retrospectively, a failure to amend the pension provisions that required the Office holder to retire when they turn 65,<sup>169</sup> attracted criticisms

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<sup>162</sup> *Director of Public Prosecutions Act 1983* (Cth) s 8.

<sup>163</sup> Ibid; Damian Bugg, 'The Independence of the Prosecutor and the Rule of Law (Paper presented at the Rule of Law: The Challenges of a Changing World, Brisbane, 31 August 2007).

<sup>164</sup> Bugg, above n 156.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> In Victoria, the Director holds office for 10 to 20 years: *Constitution Act 1975* (Vic) s 87AB; In Queensland the term of the appointment is determined by the Governor in Council: *Director of Public Prosecutions Act 1984* (Qld) s 5; In South Australia the Director is appointed for a term of 7 years: (SA) s 4; In Western Australia the term of office is 5 years: *Director of Public Prosecutions Act 1991* (WA) sch 1; In Tasmania the Director holds office 'during good behavior on such terms and conditions as the Governor determines: *Director of Public Prosecutions Act 1973* (Tas) s 5; In the Northern Territory the period of office is 'for such period as as is specified in the instrument of appointment or without limitation on the period of office': *Director of Public Prosecutions Act 1990* (NT); The Commonwealth DPP's term of appointment is determined in the instrument of appointment, but may not exceed 7 years: *Director of Public Prosecutions Act 1983* (Cth) s 18.

<sup>168</sup> Crown Law Officers Legislation Amendment (Abolition of Life Tenure) Bill 2007 (NSW); New South Wales, *Parliamentary Debates*, Legislative Council, 23 October 2007, 3030-3038 (John Ajaka); 'NSW govt reviewing life tenure for DPP', *The Sydney Morning Herald* (Sydney), 14 June 2007.

<sup>169</sup> Lisa Davis, 'DPP Nick Cowdery retires, but it won't be quietly', *The Daily Telegraph* (Sydney), 15 April 2010; Richard Ackland, 'Last Act for Hatzistergos Before Axe Falls', *The Sydney Morning Herald* (Sydney), 18 March 2011; Jamelle Wells, 'NSW DPP takes parting shot at State Govt', *ABC* (Sydney), 18 March 2011; Simon Benson, 'Legislation cuts DPP position to 10-year term', *The Daily Telegraph* (Sydney), 25 September 2007.

of the government exerting pressure on then Director Nicholas Cowdery (who was appointed for life) in an attempt to encourage him to retire from office.<sup>170</sup>

### 1 *The Case of Paul Nemer*

The case of Paul Nemer in 2003 highlights the tensions that can arise between an independent DPP and the government. In South Australia, Paul Habib Nemer shot newsagent Geoffrey Williams resulting in the loss of William's eye. A plea bargain was struck between the prosecution and the defence, where Nemer would plead guilty to the lesser charge of endangering life and the Court imposed a three-year good behavior bond.<sup>171</sup> There was public dissatisfaction with the sentence,<sup>172</sup> thought to be inadequate and too lenient given the severity of the offence, with allegations that Nemer was treated more favorably because of his affluent background.<sup>173</sup> Subsequent public pressure resulted in the Attorney-General forcing the DPP to appeal the sentence,<sup>174</sup> citing section 9 of the *Director of Public Prosecutions Act*, which provided for the Attorney-General to 'give directions and furnish guidelines to the Director in relation to the carrying out of his or her functions'.<sup>175</sup> The appeal was successful and the initial sentence quashed, with a more severe sentence of four years and nine months

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<sup>170</sup> ABC Radio, 'NSW Govt trying to "undermine independence" of the DPP', *The World Today*, 26 March 2008 (Simon Santow); Angela Kamper, 'DPP Boss Nicholas Cowdery "felt pressure to retire"', *The Daily Telegraph* (Sydney), 4 December 2010.

<sup>171</sup> *R v Nemer* (2003) 87 SASR 168.

<sup>172</sup> ABC Radio, 'Controversial SA Sentence Overturned', *PM*, 18 November 2003 (Mark Colvin); ABC Radio, 'Nemer Decision Sparks Political Debate', *PM*, 19 November 2003 (Mark Colvin). Government of South Australia, 'Plea Bargain Reforms Recommended by Kourakis Report' (News Release, 19 April 2004).

<sup>173</sup> C Hockley, 'Power of the people', *The Advertiser* (South Australia), 31 July 2003, 1.

<sup>174</sup> The Attorney-General's direction:

I Paul Holloway, Attorney-General, having consulted with the Director of Public Prosecutions, pursuant to the *Director of Public Prosecutions Act 1991* (SA) s 9(2), direct the Director of Public Prosecutions to appeal, pursuant to section 352(1)(a)(iii) of the *Criminal Law Consolidation Act 1935*(SA), to the Full Court against the sentence imposed upon Paul Habib Nemer by Justice Sulan on 25 July 2003, upon the following grounds which have been settled by the Solicitor General, and I further direct that the Director of Public Prosecutions brief the Solicitor General as counsel on the hearing of any proceedings relating to the appeal

See Office of the Director of Public Prosecutions (SA), *Annual Report 2003/2004* <<http://www.dpp.sa.gov.au/03/2003-2004.pdf>> 17; Robert Moles, *A State of Injustice* (Lothian, 2004) Ch 14.

<sup>175</sup> *Director of Public Prosecutions Act 1991* (SA) s9(2).

imprisonment imposed, including a non-parole period of one year and nine months.<sup>176</sup>

The *Nemer* case brought sharply into focus the difficulty of balancing the need to be properly accountable to the community for prosecution decisions made by the Office, with the need to ensure that those decisions are free from any political influence or even the perception of political influence.<sup>177</sup> While one may argue that the actions taken by the Attorney-General was appropriate given his role as ‘First Law Officer’, and the government was exercising its power to ‘maintain the accountability of the criminal justice system to Parliament’,<sup>178</sup> it is also arguable that the actions run contrary to the principle of independence that is the reason for the DPP’s establishment.

#### IV THE DISPLACEMENT OF DISCRETION

##### *A Plea Bargaining*

While the objective of an independent, fair and accountable prosecution service is admirable and commendable, the practicalities of the criminal justice system also need to be considered. It has been estimated that for every 1000 ‘crimes’ committed, only 400 are reported to the police and 320 are officially recorded.<sup>179</sup> Of these, only 64 will be cleared up, 43 persons convicted and only one will be imprisoned.<sup>180</sup> Such is the reality of the criminal law – of potentially unlimited offences being committed, but limited time and resources allocated to address the issues. This arguably necessitates a degree of compromise to achieve efficiency and by extension, justice.

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<sup>176</sup> *R v Nemer* (2003) 87 SASR 168.

<sup>177</sup> Office of the Director of Public Prosecutions (SA), *Annual Report 2003/2004* <<http://www.dpp.sa.gov.au/03/2003-2004.pdf>> 1, 25.

<sup>178</sup> G Kelton, ‘Government “vindicated” on Nemer case’, *The Advertiser* (South Australia) 17 February 2004, 12.

<sup>179</sup> D Brown, D Farrier, S Egger, L McNamara, A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Processes in NSW* (Federation Press, 4<sup>th</sup> ed, 2006) 50.

<sup>180</sup> *Ibid.*

Thus, in the name of efficiency,<sup>181</sup> the nature of our system of prosecutions can result in the accused pleading guilty to charges that they were not originally charged for.<sup>182</sup> Our criminal jurisprudence has accepted a system which allows an accused (in appropriate cases), charged with, say, murder, to agree to plead guilty to manslaughter in exchange for a reduced sentence.<sup>183</sup> This can be attributed to an amendment and/or withdrawal of charges, often due to the ‘plea bargaining’ process between the accused and the prosecutor.<sup>184</sup> ‘Plea bargaining’ is a general description for the process by which an accused admits his guilt in exchange for some concessions,<sup>185</sup> and it is here that one is able to see the great reach of prosecutorial discretion.<sup>186</sup> Current literature is not always consistent in the use of the term ‘plea bargaining’, ‘plea discussions’, or ‘charge bargaining’.<sup>187</sup> This issue is further compounded by slightly different models adopted by varying legal systems.<sup>188</sup> To reduce confusion, the term ‘plea bargaining’ is used in this paper

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<sup>181</sup> Though some say convenience or worse, sloth – is a factor that sustains plea bargaining, see John H Langbein, ‘Torture and Plea Bargaining’ (1978) 46 *University of Chicago Law Review* 3, 18-19.

<sup>182</sup> Sallmann and Willis, above n 54, 68.

<sup>183</sup> Paul Gerber, ‘When is Plea Bargaining Justified?’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 211.

<sup>184</sup> Sallmann and Willis, above n 54, 68.

<sup>185</sup> Matthias Boll, *Plea Bargaining and Agreement in the Criminal Process: A Comparison Between Australia, England and Germany* (2009) 1-5. Commentators have noted that an early guilty plea may attract a discount of up to 30% on sentence, see Mirko Bagaric and Julie Brebner, ‘The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea - I’m Pleading Guilty Only Because of the Discount’ (2002) 30 *International Journal of the Sociology of Law* 51; David Field, ‘Plead Guilty Early and Convincingly to Avoid Disappointment’ (2002) 14 *Bond Law Review* 251; Ralph Henham, ‘Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process’ (1999) 62 *Modern Law Review* 515. Australian case authority seems to support this with sentencing discounts that range from 20% to 35%, see *Trescuri v The Queen* [1999] WASCA 172 [25]-[26] (Anderson J); *Atholwood v The Queen* [1999] WASCA 256 [11] (Ipp J); *Miles v The Queen* (1997) 17 WAR 518, 520-1 (Malcolm CJ); *Cameron v The Queen* (2002) 209 CLR 339, 351-2 (McHugh J). While it has been emphasized that the extent of the discount is a matter of judicial discretion with no hard and fast rule, the court can take into account public policy considerations. A fast-tracked guilty plea saves the court time and resources and if an offender pleads guilty at the earliest opportunity, a discount towards the higher end of this 20%-35% range would seem to be appropriate. In *Atholwood v The Queen* [1999] WASCA 256 [9], Ipp J also opined that a guilty plea motivated genuine remorse should be afforded a greater discount than a ‘bare plea’ (a plea not accompanied by genuine remorse).

<sup>186</sup> Wayne and Marcus, above n 43, 340.

<sup>187</sup> See, eg, Herbert S Miller, *Plea Bargaining in the United States* (1978) 17 cited in Douglas D Guidorizzi, ‘Should We Really Ban Plea Bargaining: The Core Concerns of Plea Bargaining Critics’ (1998) 47 *Emory Law Journal* 753, 755, where it is noted that definition of ‘plea bargaining’ will differ depending on jurisdiction and the context of its use. See also, Geraldine Mackenzie, ‘The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?’ (2007) 11 *Southern Cross University Law Review* 205, 218; Kathy Mack, ‘Balancing Principle and Pragmatism: Guilty Pleas’ (1995) 4 *Journal of Judicial Administration* 232.

<sup>188</sup> Guidorizzi, above n 186. ‘Plea bargaining’ can also refer to the process by which the judiciary is involved to give some indication of the sentence that would likely be imposed in exchange for a guilty plea, though this is perhaps more accurately described as ‘sentence indication bargaining’ –

to refer to the process between the accused and the prosecutor where a guilty plea is agreed upon in return for a charge for a lesser offence or a dismissal of one or more charges.<sup>189</sup> The result is thus a mutually satisfactory disposition of a case, subject to the court's approval.<sup>190</sup> In this context, the judge plays little or no role and is a mere 'satellite' to the discussions, 'orbiting in a detached manner from the main body'.<sup>191</sup>

Plea bargaining has been accepted as a necessary component of the criminal justice system in Australia and many other jurisdictions.<sup>192</sup> In the United States, plea bargaining remained an underground practice until endorsement by the courts in *Santobello v New York*,<sup>193</sup> where it was acknowledged that plea bargaining was an essential component of the administration of justice.<sup>194</sup> The absence of plea bargaining would result in an overwhelmed system incapable of handling the sheer volume of criminal matters before the courts.<sup>195</sup> In the United States, it is now not uncommon for more than 90% of matters to be settled by plea bargaining.<sup>196</sup> In Australia, while the first prosecution policies contained

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see Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60 *Australian Law Journal* 199; Ole Kramp, *How to deal with the deals? The Role of Plea Bargaining in Australia and Germany – A Comparison* (2009) 5; N R Cowdery, 'Doing the Job, Practical Prosecuting' (Paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Melbourne, 19 April 1996) 3.

<sup>189</sup> See Clark, above n 187, where the author notes a preference for the term 'charge bargaining'. See also N R Cowdery, above n 187, 3; Kramp, above n 187, 4; *R v Marshall* [1981] VR 725, 732; Sallmann and Willis, above n 54, 74.

<sup>190</sup> Waye and Marcus, above n 43, 346.

<sup>191</sup> Boll, above n 185. Also, as the High Court held in *Maxwell v The Queen* (1996) 184 CLR 501, 513, such charge bargaining does not require the approval of the Court. Note that there have been some suggestions that plea-bargaining arrangements that are too favourable to the accused may amount to an abuse of court process, allowing the court to stay proceedings, see *R v Brown* (1989) 17 NSWLR 472 (though decided before *Maxwell*), where the Court suggested that gross undercharging could be an abuse of process, cited in Colvin and McKechnie, above n 10, 706.

<sup>192</sup> Though it should be noted that there is at least some research to suggest that certain jurisdictions such as Germany have resisted the plea bargaining concept, at least in principle – see John Langbein, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78 *Michigan Law Review* 204.

<sup>193</sup> *Santobello v New York*, 404 US 257, 260 (1971). For a more comprehensive view of the history of plea bargaining in the United States, see Guidorizzi, above n 186, 763.

<sup>194</sup> *Santobello v New York*, 404 US 257, 260 (1971).

<sup>195</sup> John Langbein, 'Understanding the Short History of Plea Bargaining' (1979) 13 *Law and Society Review* 261.

<sup>196</sup> United States Department of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts 2004* (2007) 1; See also United States Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics 2001* (2003) 2 which notes that '[t]he proportion of convicted defendants who pleaded guilty increased from 87% during 1990 to 95% during 2001; United States Department of Justice, Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons 2000* (2003) table 4.2 which noted that 95% of felony convictions in state courts

prohibitions against the prosecutor inviting plea negotiation dialogue with the defence,<sup>197</sup> today, as Damian Bugg notes,<sup>198</sup> a degree of informality is encouraged and prosecutors are invited to ‘open the bidding’ in plea discussions.<sup>199</sup> In Western Australia, over 90% of criminal matters are resolved summarily,<sup>200</sup> most without trial, usually by a guilty plea. It does not stretch the imagination to see that a full trial of all criminal matters would result in a drain on resources and overwhelm the system.<sup>201</sup> Singapore has its own system of plea bargaining (as will be discussed later),<sup>202</sup> but does not make plea bargaining statistics publicly available – this in and of itself is an example of the efficiency that the Singapore system values. By not disclosing plea bargaining figures, no precedent is set. This arguably makes the dispensation of justice more efficient, but perhaps at the cost of transparency.

### *1 Advantages of Plea Bargaining*

Proponents of the plea bargaining system argue that it offers benefits for all stakeholders in the criminal justice system. The prosecutor must allocate finite state resources over an ever expanding criminal docket.<sup>203</sup> With plea bargaining, prosecutors can summarily dispose of cases that are less serious, allowing them to concentrate resources on more serious offences (or offenders) that it would be in the public interest to prosecute to the fullest extent possible. The courts also benefits by preserving scarce judicial resources for more complicated and serious

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were achieved through guilty pleas; United States Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2002* (2004) 445, table 5.57 cited in Waye and Marcus, above n 43, 341; Steve Colella, ‘Guilty, Your Honor: The Direct and Collateral Consequences of Guilty Pleas and the Courts that Consistently Interpret Them’ (2004) 26 *Whittier Law Review* 305; Mackenzie, above n 186, 218.

<sup>197</sup> Damian Bugg, ‘The Role of the DPP in the 21<sup>st</sup> Century’ (Paper presented at the Heads of Prosecuting Agencies Conference, Quebec, 6 July 2007).

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid* Cf Colvin and McKechnie, above n 10, 706 [27.38] where the authors note that it should be the accused or defence counsel who initiates the plea bargaining process.

<sup>200</sup> For example Western Australia’s percentage of guilty pleas is 92.6% in 2010-2012 according to Western Australian Police, *Annual Report* (2011) 15.

<sup>201</sup> In the words of Justice Burger, plea bargaining ‘is to be encouraged’ because ‘[i]f every criminal charge were subject to a full scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities’, *Santobello v New York*, 404 US 257, 260 (1971).

<sup>202</sup> See page 81 of this paper for a discussion of the plea bargaining process in Singapore.

<sup>203</sup> Waye and Marcus, above n 43, 342.

matters,<sup>204</sup> ensuring shorter waiting times for those serious cases. An early negotiated guilty plea also reduces the expense of trial for parties and the court (considerable where there is a jury trial). Similarly, an early negotiated plea also helps victims avoid the trauma of a trial and the potential psychologically damaging effects that follow,<sup>205</sup> particularly for victims of sexual offences.<sup>206</sup> Finally (and perhaps most obviously), there is also a benefit to the accused. Rather than endure a protracted and lengthy trial, with unpredictable outcomes, the criminal defendant enters into an agreement with the prosecution and receives certain concessions by way of sentencing and a reduction in the severity and/or the overall number of charges.<sup>207</sup>

## *2 Disadvantages of Plea Bargaining*

The plea bargaining process raises many philosophical and ethical issues. While in principle the judge, despite not being a part of the negotiation between accused and the prosecutor, is required to ensure that a plea of guilty by the accused to any proposed charges is entered into freely and voluntarily and to impose a sentence that properly reflects the criminal conduct of the accused, this is not always the case in practice.<sup>208</sup> A plethora of factors may impact on the accused's decision to plead guilty – the desire to avoid the social stigma that a public trial would bring, the desire to resolve the matter speedily, the desire for a more lenient sentence, or perhaps even the desire to protect co-offenders.<sup>209</sup> These factors are not always apparent to the judge,<sup>210</sup> or even if apparent, may still result in the court's reluctance to intrude on the exercise of prosecutorial discretion.<sup>211</sup> Additionally, while judges may theoretically reject the prosecution's recommendation on sentencing, this is seldom the case in practice and more often than not the

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<sup>204</sup> Ibid.

<sup>205</sup> Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practice* (Australian Institute of Judicial Administration, 1995) 85.

<sup>206</sup> William F McDonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim' (1976) 13 *American Law Review* 649, 656.

<sup>207</sup> Waye and Marcus, above n 43, 342.

<sup>208</sup> John Bishop, *Prosecution without Trial* (Butterworths, 1989) 200.

<sup>209</sup> Mackenzie, above n 186, 216; Peter Hidden, 'Some Ethical Problems for the Criminal Advocate' (2003) 27 *Criminal Law Journal* 191; Bishop, above n 208; Kramp, above n 188, 7.

<sup>210</sup> Kramp, above n 188, 7.

<sup>211</sup> Bishop, above n 208.

recommendations of the prosecutor are simply followed,<sup>212</sup> resulting in the prosecutor essentially selecting the sentence for the court.<sup>213</sup> This issue is also compounded with the advent of mandatory penalties (as will be discussed later).<sup>214</sup>

(a) *Fair Labeling and Bargaining*

It is an underlying thread of the criminal law that the degrees of wrongdoing should be subdivided and labeled so as to represent fairly the nature and magnitude of the law-breaking.<sup>215</sup> This is the principle of ‘fair labeling’<sup>216</sup> and is the voice through which the ‘criminal law speaks to society as well as wrongdoers when it convicts them...by accurately naming the crime of which they are convicted’.<sup>217</sup> With plea bargaining, the offence which the offender pleads guilty to may not necessarily be the one which accurately reflects the nature of the criminal conduct.<sup>218</sup> Critics assert that it is criminals who benefit from the system by effectively ‘bargaining with the state’ and avoiding what would have been an appropriate sanction for their crime.<sup>219</sup> Is it fair that a murderer may only be convicted of wounding or that the actions of thieves are labeled as mere attempts

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<sup>212</sup> President’s Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (1978) 11 cited in Bishop, above n 208.

<sup>213</sup> Bishop, above n 208.

<sup>214</sup> See page 42 of this paper.

<sup>215</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 5th ed, 2006) 88. See also J Chalmers and F Leverick, ‘Fair Labelling in Criminal law’ (2008) 71 *Modern Law Review* 217, 246.

<sup>216</sup> The principle of fair labeling can be traced back to Ashworth’s work, ‘The Elasticity of Mens Rea’ in C F H Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981) 45, 53, where he coined the term ‘representative labeling’. This was later further developed by in G Williams, ‘Convictions and Fair Labelling’ (1983) 42 *Cambridge Law Journal* 85 stating that fair labelling was a better term chiefly because ‘representative’ can also refer to the few standing for the many.

<sup>217</sup> A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (Hart, 3<sup>rd</sup> ed, 2007) 30.

<sup>218</sup> Chalmers and Leverick, above n 215, (note 131). It has also been noted elsewhere that ‘the criminal law is arguably the most direct expression of the relationship between a State and its citizens’, see Law Commission for England and Wales, *Criminal Law: A Criminal Code For England and Wales Vol 1* (Law Com No 177, 1989, 5).

<sup>219</sup> Guidorizzi, above n 188, 768. See also J Badgery-Parker, ‘The Criminal Process in Transition: Balancing Principle and Pragmatism II’ (1995) *Australian Journal of Judicial Administration* 193, 210-216.



or possession?<sup>220</sup> Aside from throwing crime statistics into chaos it risks undermining public confidence in the criminal justice system.<sup>221</sup>

This issue is evident in several extreme, but illustrative cases. In New York for example, an accused was charged with first degree manslaughter but later pleaded guilty to attempted manslaughter in the second degree.<sup>222</sup> The oddity was that in that particular jurisdiction, the crime of manslaughter does not involve intent and it would therefore be impossible to attempt to commit manslaughter. The New York Court of Appeals, while aware of the issue, was nonetheless not prepared to upset the conviction.<sup>223</sup> In another more comical case, an accused pleaded guilty to ‘driving the wrong way on a one-way street’.<sup>224</sup> There were however, no one-way streets in that particular community. These cases, while absurd, do highlight the dangers inherent in uncontrolled prosecutorial discretion.<sup>225</sup>

#### (b) *The Dissatisfied Victim*

The role of the victim sometimes takes a backseat in our criminal process.<sup>226</sup> McDonald notes that ‘while the victim is allowed to decide what shall be done with the case as a civil matter...the criminal case belongs solely to the State.’<sup>227</sup> This is derived from the notion that crime is perceived as an offence against not

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<sup>220</sup> Boll, above n 185, 31.

<sup>221</sup> Langbein, above n 181, 16-17; James Edward Bond, *Plea bargaining and Guilty Pleas* (Boardman, 1975) 53; Matthias Boll, *Plea Bargaining and Agreement in the Criminal Process: A Comparison Between Australia, England and Germany* (2009) 31.

<sup>222</sup> *People v Foster*, 278 NYS 2d 603 (1967), taken from A Davis, ‘Sentences for Sale: A Look at Plea Bargaining in England and America [1931]’ *Criminal Law Review* 150, 218, 220 and Bishop, above n 208, 201.

<sup>223</sup> Ibid.

<sup>224</sup> D J Newman, *Conviction* (1996) 101; Bishop, above n 208, 201; Boll, above n 185, 31.

<sup>225</sup> Bishop, above n 208, 201.

<sup>226</sup> See comments such as ‘Victims remain on the outside looking in, rather than being engaged as direct and active decision makers’ in Law Commission of Canada, *From Restorative Justice to Transformative Justice*, Paper for the Law Commission of Canada (1999) 18. Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 3<sup>rd</sup> Ed, 2005) 49; McDonald describes the victim as the ‘forgotten man’ of the criminal justice system in McDonald, above n 206, 650. See also, H Fenwick, ‘Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process’ (1997) 60 *Modern Law Review* 317.

<sup>227</sup> See for example Michael O’Connell, ‘Evolving Mechanisms for Engaging Victims in the Sentencing Process: Should Victims Have a Stronger Voice in Court’ (Paper presented at the Sentencing Conference: Principles, Perspectives and Possibilities, National Judicial College of Australia, Canberra, 10-12 February 2006); McDonald, above n 206, 650.

just the individual, but society,<sup>228</sup> and is accordingly a matter for the State. As argued above,<sup>229</sup> there are circumstances where it may be in the interests of the victim to avoid trial. Conversely, there are situations where the victim may prefer to go to court and testify if the alternative is the accused receiving a lesser charge (and consequently, a lesser sentence).<sup>230</sup>

Plea bargaining deprives the victim of this option. While a victim's view may be considered, this varies with the individual prosecutor.<sup>231</sup> Ultimately, if the decision is made to enter into a plea bargaining arrangement with the accused, there may be a feeling of dissatisfaction by the victim that the offender has 'gotten away' with a lenient sentence.<sup>232</sup> While the advantages of plea bargaining focus on the resource implications for the system as a whole, the individual victim is only focused on their particular case. Plea bargaining potentially leaves victims dissatisfied with the criminal justice system leading to diminished public confidence in the process.<sup>233</sup>

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<sup>228</sup> McDonald notes that the transformation of the victim from a central to peripheral actor can be attributed to (1) the advent of the great experiment in corrections and rehabilitations; (2) the growth of the office of public prosecutor and (3) the creation of a modern police force. While McDonald is referring to these factors in the American social and historical setting, the Australian story is not dissimilar – as explained earlier in this paper, Australia moved away from the initial system of private prosecutions with the introduction of a professional police force and prosecution service.

<sup>229</sup> See page 33 of this paper.

<sup>230</sup> Mack and Anleu, above n 205; Henham, above n 185, 537.

<sup>231</sup> Though interestingly, there have been suggestions that victim participation in the plea bargaining process might help legitimize it in the public perception, see Sarah Welling, 'Victim Participation in Plea Bargaining' (1987) 65 *Washington University Law Quarterly* 301, 309 (note 31).

<sup>232</sup> Guidorizzi, above n 188, 770.

<sup>233</sup> This brings up a host of other issues - public dissatisfaction may in turn influence citizens' willingness to comply with the law and result in vigilante justice, see Timothy J Flanagan, Edmund F McGarrell and Edward J Brown, 'Public Perception of the Criminal Courts: The Role of Demographic and Related Attitudinal Variables' (1985) 22(1) *Journal of Research in Crime and Delinquency* 66, 68; Catherine Kaukinen and Sandra Colavecchia, 'Public Perception of the Courts: An examination of attitudes toward the treatment of victims and accused' (1999) 41 *Canadian Journal of Criminology* 365, 367.

### 3 The Prosecutor-Adjudicator: The Prosecutor's Power in the Pre-Trial Decision Making Process

The great reach of prosecutorial discretion is prominently seen in the plea bargaining process.<sup>234</sup> Prosecutors are given great leeway in plea bargaining<sup>235</sup> as they and they alone determine which charges to lay against the accused,<sup>236</sup> whether they will make or accept a plea bargain offer or even if all charges should be dismissed.<sup>237</sup> An accused's acceptance of a lesser plea does not require the approval of the court.<sup>238</sup> This has resulted in the prosecution's role being one of the most important in the pre-trial decision-making process.<sup>239</sup> The court has little or no opportunity to intervene in the pre-trial decision making process.<sup>240</sup> Its task is limited to passing sentence after the charge bargaining arrangements have been concluded and the accused has pleaded guilty to the respective charges.<sup>241</sup>

Plea bargaining puts the prosecutor center stage in criminal administration and forms a vital component of the massive and powerful reservoir of prosecutorial discretion.<sup>242</sup> Arguably, plea bargaining system places too much power into the hands of the prosecution.<sup>243</sup> Commentators have referred to this enormous discretion, done without judicial oversight, as 'prosecutorial adjudication'.<sup>244</sup> It has been contended that

with trials in open court and deserved sentences imposed by a neutral fact finder, we protect the due process right to an adversarial trial, minimize the risk of unjust conviction of the innocent, and at the same time further the public interest

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<sup>234</sup> Waye and Marcus, above n 43, 340.

<sup>235</sup> Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3<sup>rd</sup> edition, 2005) 123.

<sup>236</sup> *GAS and SJK v The Queen* (2004) 78 ALJR 768, 793.

<sup>237</sup> Rebecca Krauss, 'The Theory of Prosecutorial Discretion in Federal Law: Origins and Development' (2009) 6(1) *Seton Hall Circuit Review* 1, 8.

<sup>238</sup> *R v Andrew Foster Brown* (1989) 17 NSWLR 472, 480. Even if there may be evidence before the judge in supporting a more serious charge, see *Maxwell v The Queen* (1996) 184 CLR 501; Findlay, above n 235, 111.

<sup>239</sup> Kramp, above n 188, 6.

<sup>240</sup> *Wilson and Another v McCormack* [1968] Tas SR 55, 61.

<sup>241</sup> *Maxwell v The Queen* (1996) 184 CLR 501.

<sup>242</sup> Sallmann and Willis, above n 54, 76.

<sup>243</sup> Langbein, above n 181.

<sup>244</sup> Krauss, above n 237; Maximo Langer, 'Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure' (2006) 33 *American Journal of Criminal Law* 223; Langbein, above n 181.

in effective law enforcement and adequate punishment of the guilty...plea negotiations simultaneously undercuts all of these interests.<sup>245</sup>

This has lead to some to call for its abolition.<sup>246</sup> Indeed, the wide range of powers the prosecutor has in the conduct of prosecutions provides a degree of leverage. Critics have noted that in some circumstances,<sup>247</sup> the daunting penalties that a defendant faces if convicted in court can result in the innocent defendant pleading guilty.<sup>248</sup> Risk adverse defendants (even if innocent),<sup>249</sup> when faced with the choice of pleading guilty weighed against the harsh penalties if convicted at trial, may well choose to plead guilty.<sup>250</sup> The forum for the determination of an individual's liberty thus shifts from open court to the offices of the prosecutor, giving him power of both judge and prosecutor.<sup>251</sup>

As highlighted, one can begin to comprehend the immense scope and reach that the prosecutorial discretion affords. This is however, not the end of the story. It has it seems become somewhat fashionable for legislatures throughout the world to concentrate discretion that should, in an ideal system, be properly vested in other branches of government, into the executive office of the prosecutor. Broadly defined offences, overlapping provisions in the criminal codes and a fondness for mandatory sentencing have worked to expand the authority of the prosecutor.<sup>252</sup>

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<sup>245</sup> Stephen J Schulhofer, 'Plea Bargaining as Disaster' (1992) 101 *Yale Law Journal* 1979, 2009.

<sup>246</sup> Ibid.

<sup>247</sup> Guidorizzi, above n 188, 771.

<sup>248</sup> Thomas Church, 'In Defense of Bargain Justice' (1979) 13 *Law and Society Review* 509, 514-515; Herbert Packer, *The Limits of Criminal Sanction* (1968) 116-117. See also Russell D Covey, 'Signaling and Plea Bargaining's Innocence Problem' (2009) 66 *Washington and Lee Law Review* 73.

<sup>249</sup> There may be a number of reasons why an innocent defendant may wish to plead guilty. This can include the desire to get the matter done and over with, or a desire to conceal other conduct which a trial may disclose, see Mackenzie, above n 187.

<sup>250</sup> Robert Scott and William Stunz, 'A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants' (1992) 101 *Yale Law Journal* 2011, 2012.

<sup>251</sup> Abraham Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* (1981) 3-5.

<sup>252</sup> Misner, above n 63.

## B Overcriminalization and Broadly Defined Statutes

Legislators enact broad criminal statutes capable of nondiscriminatory application.<sup>253</sup> It then falls to the police and prosecution to identify and select a manageable number of cases to prosecute.<sup>254</sup> Given that criminal conduct is described in general terms, ‘sweep[ing] together similar acts by markedly different actors amid infinitely variable circumstances, the exercise of discretion allows for the law to exempt those for whom criminal prosecution is neither appropriate nor necessary’.<sup>255</sup> This discretion is also seen as necessary as public attitudes change over time and it is not always immediately possible for the legislature to make the necessary amendments. To some extent, prosecutorial discretion also functions as an informal means of ‘testing’ public reaction which may lead to subsequent legislative amendments on the issue.<sup>256</sup>

The problem arises when legislators become overzealous in promulgating more criminal laws than the Executive has resources to enforce.<sup>257</sup> Indeed, if one takes into account the politics of the criminal law, legislators, as elected representatives of the people, are often tempted by the conventional wisdom that appearing tough on crime is one way of garnering popularity amongst the electorate.<sup>258</sup> This has subsequently resulted in a myriad of new offences and enhanced penalties as ‘publicity stunts’ designed to win support and elections.<sup>259</sup>

Commentators have noted that statutory criminal codes contain so many overlapping provisions that the choice of how to characterize conduct as criminal has passed to the prosecutor.<sup>260</sup> One of the dangers of these overly broad statutes is that they can be utilized by the prosecution for ‘posturing’ during the plea

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<sup>253</sup> Poulin, above n 30.

<sup>254</sup> Ibid.

<sup>255</sup> Teslik W Randolph, *Prosecutorial Discretion: the decision to charge: An Annotated Bibliography* (National Institute of Law Enforcement and Criminal Justice, 1975) 7.

<sup>256</sup> Abrams Norman, ‘Internal Policy: Guiding the Exercise of Prosecutorial Discretion’ (1971) 19 *University of California Law Review* 1, 3.

<sup>257</sup> Poulin, above n 30, 1081.

<sup>258</sup> Erik Luna, ‘The Overcriminalization Phenomenon’ (2005) 54 *American University Law Review* 703, 719.

<sup>259</sup> Ibid 720.

<sup>260</sup> Misner above n 63, 742.

bargaining process.<sup>261</sup> Indeed, as Dervan argues, there is a ‘symbiotic relationship’ between overcriminalisation and plea bargaining – both he contends, rely on each other for their very existence in the criminal justice system.<sup>262</sup> Expanding statutory offences only provides more ‘items on a menu from which the prosecutor may order as she [sic] wishes’.<sup>263</sup>

One controversial example of overly broad legislation that indirectly results in heightened prosecutorial discretion may be found in Singapore’s *Misuse of Drugs Act*.<sup>264</sup> The Act imposes severe punishment on drug trafficking,<sup>265</sup> which is defined in the Act as ‘to give, sell, administer, transport, send, deliver or distribute’.<sup>266</sup> The Singapore courts have interpreted this literally and merely passing possession on to someone else can amount to trafficking, regardless of the offender’s intent for personal use or safekeeping.<sup>267</sup> There are however some possible exceptions. For example, a traditional Chinese physician was held not to be trafficking when he secretly administered opium as a remedy for pain relief of joints.<sup>268</sup> The effect of broadly defined ‘drift net’ statutes is that it is up to the police and prosecution to determine who the ‘real traffickers’ are.<sup>269</sup>

Similarly, in Western Australia, the *Criminal Property Confiscation Act* gives the State a wide scope to seize property that is the proceeds of crime or property that has been unlawfully obtained.<sup>270</sup> The Act is also notable for its reversal of the onus of proof,<sup>271</sup> requiring suspects to prove that their wealth was lawfully

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<sup>261</sup> Lucian E Dervan, ‘Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization’ (2011) 7 *Journal of Law Economics and Policy* 645, 653.

<sup>262</sup> Ibid 645.

<sup>263</sup> William Stunz, ‘Plea bargaining and Criminal Law’s Disappearing Shadow’ (2004) 117 *Harvard Law Review* 2548, 2549.

<sup>264</sup> *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008).

<sup>265</sup> Michael Hor, ‘Singapore’s Innovations to Due Process’ (2001) 12 *Criminal Law Forum* 25 (note 32). Trafficking in more than 1000gm of cannabis attracts mandatory death. Where the amount is between 660gm and 1000gm the punishment is a maximum of 30 years or life imprisonment and 15 strokes (of the cane), and a minimum of 20 years and 15 strokes. Where the amount is less than 660, it is a maximum of 20 years and 15 strokes, and a minimum of 5 years and 5 strokes. See also the *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008) sch 2.

<sup>266</sup> *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008) s 2.

<sup>267</sup> *Muhammad Jeffrey v PP* [1997] 1 SLR 197; *Lee Yuan Kwang v PP* [1995] 2 SLR 349.

<sup>268</sup> *Ng Yang Sek v PP* [1997] 3 SLR 661.

<sup>269</sup> Hor, above n 265, 33.

<sup>270</sup> *Criminal Property Confiscation Act 2004* (WA).

<sup>271</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2000, 523 (Jim McGinty, Attorney-General).

obtained and its unlimited retrospectivity.<sup>272</sup> The Attorney-General, Jim McGinty acknowledged when introducing the Act that it ‘is being cast far broader than ever could be intended to apply’.<sup>273</sup> Its breadth ‘means the role of the Director of Public Prosecutions as its controller is crucially important. [It requires] a DPP who will not use the power capriciously and will take into account the public interest’.<sup>274</sup>

A related problem is when laws on statute books are not regularly enforced. This undermines the legal system and the rule of law. In Singapore, section 377A of the *Penal Code* criminalizes sexual conduct between males.<sup>275</sup> While the Government has stated that this will not be actively enforced,<sup>276</sup> it nonetheless remains on the statute books and could theoretically be utilized by prosecutors for ‘posturing’ - by putting forward a section 377A charge, then offering to accept a guilty plea to a lesser offence. An example of this was seen in the recent *Tan Eng Hong* case.<sup>277</sup> This puts the offender in an unenviable situation and most may well plead guilty to the lesser offence if only to avoid the stigma of a section 377A charge. Overly broad legislation and laws that are on the books but not regularly enforced effectively shift discretion from the courts to the prosecutors.

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<sup>272</sup> Ibid.

<sup>273</sup> Ibid 524. See also, Amanda Banks, ‘Fight against seizure laws: WA Governor’, *The Weekend West* (Western Australia), 20-21 August 2011, 21; ‘Calls for Changes to Confiscation Laws’, *ABC* (online), 27 June 2011 <<http://www.abc.net.au/news/2011-06-27/calls-for-changes-to-confiscation-laws/2772886>>; ‘Law Society labels confiscation laws as draconian’, *ABC* (online), 14 June 2011 <<http://www.abc.net.au/news/2011-06-14/law-society-labels-confiscation-laws-draconian/2757990>> for some background on the controversy of the confiscation laws in Western Australia.

<sup>274</sup> Ibid.

<sup>275</sup> *Penal Code* (Singapore, cap 224, rev ed 2008).

<sup>276</sup> Despite a petition tabled by Nominated Member of Parliament, Siew Kum Hong to amend the Penal Code, s 377A remains law, see Singapore, *Parliamentary Debates*, 22 October, vol 83, col 2175; Singapore, *Parliamentary Debates*, 23 October, vol 83, col 2352; Hoe Yee Nie, ‘Singapore won’t repeal homosexual sex law’, Channel News Asia (online) 5 July 2009 <<http://www.channelnewsasia.com/stories/singaporelocalnews/view/440540/1/.html>>.

<sup>277</sup> In *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320, Tan Eng Hong was initially charged with s 377A of the *Penal Code* (Singapore, cap 224, rev ed 2008), this was later amended by the prosecution to the less serious and less controversial offence of s 294(a) of the *Penal Code* (Singapore, cap 224, rev ed 2008) which makes it an offence to commit an obscene act in a public place). Tan Eng Hong pleaded guilty to the lesser offence and was fined SGD\$3000. While the initial appeal was unsuccessful for lack of locus standi, the Court of Appeal has since reversed this decision and a full hearing on the merits of the case is pending at time of writing. See *Tan Eng Hong v Attorney-General* [2012] SGCA 45 for details.

Prosecutors can also ‘negate’ possible defences raised by the accused in the framing of charges. For example, facts that give rise to an assault occasioning bodily harm under the *Criminal Code*<sup>278</sup> can also fall under the category of wounding or grievous bodily harm.<sup>279</sup> In the former, the defence of provocation is open to the accused, whereas the latter offences make no such provisions. Again, the prosecutor is able to select from the menu of charges available which to proceed on. In the careful selection of charges, prosecutors can thus effectively anticipate and bypass defences that may be raised.

As argued, through overcriminalisation and broadly defined statutes, Legislatures have effectively abdicated public policy-making to the prosecutor.<sup>280</sup> This has attracted criticism that prosecutors are ‘the criminal justice system’s real lawmakers’.<sup>281</sup>

### *C The Imposition of Mandatory Minimum Sentences*

Mandatory minimum sentences also shifts discretion from the courts and place it into the prosecutor’s hands. Mandatory minimum sentencing<sup>282</sup> refers to the practice of parliament setting a fixed penalty for the commission of a criminal offence.<sup>283</sup> This effectively leaves the court with only one (or rather no) option upon sentencing.<sup>284</sup> With mandatory minimum sentencing, the choice of charge laid has a profound and direct impact on sentence. The same reasons that give rise to overcriminalisation can also be found in mandatory minimum sentencing – politicians are eager to be seen as tough on crime.<sup>285</sup> Mandatory sentencing dates

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<sup>278</sup> *Criminal Code of Western Australia* s 317.

<sup>279</sup> If the injury sustained is serious enough to be classified as wounding or grievous bodily harm, see *Criminal Code of Western Australia* s ss 301 and 207 for the offences of wounding and grievous bodily harm, respectively.

<sup>280</sup> Misner, above n 63, 746.

<sup>281</sup> William Stunz, ‘The Pathological Politics of Criminal Law’ (2001) 100 *Michigan Law Review* 505, 506.

<sup>282</sup> Sometimes referred to as ‘mandatory minimum penalties’ or ‘mandatory penalties’.

<sup>283</sup> Declan Roche, ‘Mandatory Sentencing’ [1999] (138) *Trends and Issues in Crime and Criminal Justice* 1.

<sup>284</sup> Neil Morgan, ‘Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories’ (1999) 22 *University of New South Wales Law Journal* 267, 267.

<sup>285</sup> *Ibid.* There are also a number of arguments in favour of mandatory minimum sentencing: selective incapacitation, deterrence, consistency, democratic principles but a comprehensive



as far back as 1790 in the United States,<sup>286</sup> and in the eighteenth and early nineteenth century in England.<sup>287</sup> The 1990s witnessed a number of varying jurisdictions across the common law world increasing the number of mandatory sentencing laws.<sup>288</sup> Canada began passing a record number of mandatory sentencing laws from 1982<sup>289</sup> and by 1999, the *Criminal Code of Canada* contained 29 offences carrying mandatory sentencing.<sup>290</sup> The United States has enacted a myriad of mandatory sentencing laws relating to aggravated rape, drug felonies, felonies involving firearms and felonies committed by previously convicted felons.<sup>291</sup> Singapore is no stranger to mandatory minimum sentencing having inherited fixed sentencing from the *Indian Penal Code*.<sup>292</sup> Mandatory sentencing was later expanded for crimes under a number of statutes<sup>293</sup> and the *Penal Code (Amendment) Act 1984* provided for the imposition of mandatory minimum sentences for a range of offences including robbery, housebreaking, vehicle theft, extortion, aggravated outrage of modesty, and rape (if certain circumstances are made out).<sup>294</sup>

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discussion on the advantages and disadvantages of mandatory minimum sentencing is best left for another paper.

<sup>286</sup> Thomas Gabor and Nicole Crutcher, 'Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Justice System Expenditures' (Research Report, Department of Justice Canada, 2001) 1.

<sup>287</sup> Kate Warner, 'Mandatory Sentencing and the Role of the Academic' (2007) 18 *Criminal Law Forum* 323.

<sup>288</sup> Morgan, above n 284.

<sup>289</sup> Julian Roberts, 'Public Opinion and Mandatory Sentencing, A Review of the International Findings' (2003) 30 *Criminal Justice and Behavior* 483, 485.

<sup>290</sup> Gabor and Crutcher, above n 286, annex A; *Criminal Code of Canada* RSC 1985, c C-46.

<sup>291</sup> Michael Tonry, *Sentencing Matters* (Oxford University Press, 1996) 146.

<sup>292</sup> Palakrishnan, 'Mandatory Sentences and Judicial Discretion in Criminal Law: Throwing Away the Key?' (Paper presented at the LawAsia Conference, Christchurch, New Zealand, 6 October 2001) 5.

<sup>293</sup> Including the *Arms Offences Act* (Singapore, cap 14, rev ed 2008), *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008), *Immigration Act* (Singapore, cap 133 rev ed 2008), *Vandalism Act* (Singapore, cap 341, rev ed 1985), *Miscellaneous Offences (Public Order and Nuisance) Act* (Singapore, cap 184, rev ed 1997), *Undesirable Publications Act* (Singapore, cap 338, rev ed 1988), *Internal Security Act* (Singapore, cap 143, rev ed 1985), *Banishment Act* (Singapore, cap 18, rev ed 1985), *Maintenance of Religious Harmony Act* (Singapore, cap 167A, rev ed 2001), *Environmental Public Health Act* (Singapore, cap 95, rev ed 2002), see Ross Worthington, 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore' (2002) 28 *Journal of Law and Society* 490, 510.

<sup>294</sup> Chan Wing Cheong and Andrew Phang, *The Development of Criminal Law and Criminal Justice in Singapore* (2001) 41, to be read in conjunction with Jill Tan, 'Book Review: The Development of Criminal Law and Criminal Justice in Singapore' [2001] *Singapore Journal of Legal Studies* 229, 230 as the latter corrects a number of inaccuracies in the original article. See Palakrishnan, above n 290. The respective offences are contained in the *Penal Code* (Singapore, cap 224, rev ed 2008) include robbery: s392; housebreaking: ss456, 457; vehicle theft: s379A; extortion: s383; aggravated outrage of modesty: s354A; rape: s376(2). See also Singapore,

In 1996 Western Australia<sup>295</sup> adopted mandatory minimum sentencing for property offences in response to a ‘moral panic’ due to a number of home invasions and the perceived inadequateness of sentences. This resulted in the ‘three-strike rule’ which provided that an offender convicted for the third time for a home burglary *must* receive a 12 month term of imprisonment.<sup>296</sup> More recently, likely due to the incident of police officer Matthew Butcher being assaulted and paralysed, Parliament has passed mandatory sentencing laws for persons convicted of assaulting police officers.<sup>297</sup> It would seem then that the Legislature in Western Australia and in various other jurisdictions have taken to including mandatory minimum penalties in their criminal statutes in what may be a populist approach.<sup>298</sup>

The issue with mandatory minimum sentencing is that it ‘chips away’<sup>299</sup> at the judge’s role as adjudicator and curtails judicial discretion in sentencing, transferring it to the prosecution.<sup>300</sup> Critics argue that the legislature’s

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*Parliamentary Debates*, 26 July 1984, vol 44, col 1861 for the Second Reading Speech of the *Penal Code (Amendment) Act 1984*.

<sup>295</sup> The earlier Western Australia attempt at mandatory sentencing through the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) was a political maneuver to ‘cling to power’ and short lived. See Morgan, above n 284, 269.

<sup>296</sup> See s 401(4) *Criminal Code of Western Australia* (emphasis added); Morgan, above n 282, 269.

<sup>297</sup> In 2009, the Criminal Code Amendment Bill 2008 (WA) was passed in Parliament and introduced mandatory sentencing provisions for people convicted of assaulting or causing bodily harm to police officers, ambulance officers, transit guards, court security officers or prison officers; See Explanatory Memorandum, Criminal Code Amendment Bill 2008 (WA); Joseph Sapienza, ‘Mandatory Sentencing Law Concerns to Upper House’ *WA Today* (Western Australia, 22 June 2009).

<sup>298</sup> As mentioned in footnote 285, there are possible advantages to mandatory minimum sentencing. It should be noted though that in both Australia and Singapore, proponents of mandatory sentencing are more commonly found in Parliament than in academia. See the relevant Hansards in the respective jurisdictions – Western Australia: Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 964-966 (Christian Porter, Attorney-General); Singapore: Singapore, *Parliamentary Debates*, 9 May 2000, vol 72, col 151-163; Singapore, *Parliamentary Debates*, 16 February 1973, col 416; Singapore, *Parliamentary Debates*, 30 November 1973, vol 32, col 1348 (Chua Sian Chin); Singapore, *Parliamentary Debates*, 26 July 1984, vol 44, col 1867-1870 (Chua Sian Chin); Singapore, *Parliamentary Debates*, 9 March 2001, vol 73, col 506-532; Singapore, *Parliamentary Debates*, 26 July 1984, vol 44, col 1863, 1959-1962 (Chua Sian Chin). The WA Police Union has recently suggested that mandatory sentencing is responsible for ‘backroom deals’ between the prosecution and the accused, see Amanda Banks, “‘Backroom deals’ letting thugs off lightly”, *The West Australian* (Western Australia) 29 October 2012.

<sup>299</sup> Tan, above n 294.

<sup>300</sup> Becky Kohler da Cruz, *Prosecutorial Discretion Under Georgia’s Two Strikes Provision: A Quantitative Analysis* (PhD Thesis, Capella University, 2008) 8, 11; Barbara Vincent and Paul

demonstrated eagerness to implement mandatory sentencing regimes is a knee-jerk reaction perceived to be popular with the electorate. Given this, the argument is that this is the beginning of a slippery slope that will eventually see a plethora of offences on the statute books with mandatory minimum penalties that may, in the most extreme scenario, see judicial discretion reduced and prosecutorial discretion reaching unprecedented levels.

### 1 *The Mandatory Death Penalty*

Singapore has unapologetically imposed mandatory penalties as a response to a perceived breakdown in social order.<sup>301</sup> Controversially, it has also achieved notoriety for the ultimate mandatory penalty – the mandatory death penalty.<sup>302</sup> Singapore prescribes the mandatory death penalty for a number of offences, including homicide and drug offences.<sup>303</sup> The mandatory death penalty is quite different from the death penalty. In the latter, the death penalty may be imposed as a sentence, subject to the discretion of the court. In the former, the court's role is minimized so that upon the pronouncement of guilt (or acceptance of a guilty plea by the accused), the law expressly demands the imposition of the death penalty. In such situations, the hands of the court are tied in matters of sentencing.

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Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (Federal Judicial Centre, 1994) 21.

<sup>301</sup> *The Penal Code (Amendment) Act 1984* (Singapore) provided for the imposition of mandatory minimum sentences for a range of offences including robbery, housebreaking, vehicle theft, snatch theft, extortion, aggravated outrage of modesty, and rape (if certain circumstances are made out). See the various sections of the *Penal Code* (Singapore, cap 224, rev ed 2008) - robbery: s392; housebreaking: ss 456, 457; vehicle theft: s 379A; extortion: s 383; aggravated outrage of modesty: s 354A; rape: s 376(2). For further discussion on the mandatory minimum sentencing regime in Singapore see Daniel Chia Jin Chong, 'Judicial Benchmarking in Singapore' (2000) 12 *Singapore Academy of Law Journal* 194; Loo Ngan Chor, 'Judicial Discretion & Mandatory Sentences' [1999] (December) *Singapore Law Gazette* 32; Stanley Yeo, 'Mandatory Minimum Sentences: A Tying of Judicial Hands' [1985] 2 *Malayan Law Journal* clxxxvi-cxii. For some historical context of Singapore's breakdown in social order immediately after independence from the British, see Chan Sek Keong, 'Rethinking the Criminal Justice System of Singapore for the 21st Century' in *The Singapore Conference: Leading the Law and Lawyers into the New Millennium@2020* (Butterworths, 2000) 12.

<sup>302</sup> Michael Hor, 'The Death Penalty in Singapore and International Law' (2004) 8 *Singapore Year Book of International Law* 105.

<sup>303</sup> See *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008) sch 2, which sets out the relevant prohibited drugs and the mandatory penalties that flow - the mandatory death penalty for anyone caught with more than 15 g of heroin, 30 g of cocaine, or 500 g of cannabis. See also *Penal Code* (Singapore, cap 224, rev ed 2008) s302 for homicide offences. Note though, that at time of writing, a number of changes to the mandatory death penalty for homicide and drug offences are being discussed (which is elaborated on later in this paper).

It is arguable that to some extent, the power over life and death slides out of the judiciary, into the hands of the prosecution.

This curtailing of the judiciary's discretion may be due to a number of reasons. It may be to allow for greater consistency in sentencing, or it may be part of a larger political trend toward distrust of the courts and greater empowerment of the prosecutor.<sup>304</sup> For some, this shift in power has caused concern, while others have accepted it as a necessary state of affairs. Nevertheless, this shift illustrates the 'hydraulic displacement effect'.<sup>305</sup> The displacement theory proposes that discretion is inevitable,<sup>306</sup> and in this case the discretion taken away from the courts merely appears elsewhere – in the prosecutor's office.

As argued above, plea bargaining, overcriminalisation, broadly defined statutes and mandatory minimum sentences have given prosecutors greater leeway in the administration of justice. These measures have not however, come without their own costs. The expanded discretion afforded to prosecutors have arguably resulted in lessened transparency and accountability.

## V RESTRAINTS ON THE PROSECUTOR

### *A Duty to Give Reasons*

The body responsible for the definition of a crime, the Legislature, is subject to the democratic process and is accountable to the electorate. Parliamentary debates are publicized and freely available. Similarly, the Judiciary, responsible for pronouncing guilt or innocence, also has certain standards to hold them

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<sup>304</sup> Jill Farrell, 'Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity' (2003) 5 *Justice Research and Policy* 95; Kate Stith and Jose A Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press, 1998); Jeffrey T Ulmer, Megan C Kurlychek and John H Kramer, 'Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences' (2007) 44 *Journal of Research in Crime and Delinquency* 427; Jeffrey T Ulmer, *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines* (State University of New York Press, 1997) 16.

<sup>305</sup> Terance D Miethe, 'Charging and Plea Bargaining Practices under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion' (1989) 78 *The Journal of Criminal Law and Criminology* 155.

<sup>306</sup> Nancy Gertner, 'Sentencing Reform: When Everyone Behaves Badly' (2005) 57 *Maine Law Review* 570; Nancy Gertner, 'Federal Sentencing Guidelines: A View From The Bench' (2002) 29 *Human Rights Magazine* 6, 23.

accountable. Save for a few exceptions,<sup>307</sup> court hearings are open to the public. Most mature and competent judicial systems have adopted the principle heralded by Lord Denning more than half a century ago that in order for a trial to be fair, it is necessary not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen if the decision maker states his reasons.<sup>308</sup> This facilitates public accountability, public scrutiny, and public confidence in the system.<sup>309</sup> Additionally, in *Coleman v Dunlop Limited*,<sup>310</sup> Henry LJ, in quoting Lord Donaldson MR, stated that '[h]aving to give reasons concentrates the mind wonderfully'.<sup>311</sup> Singaporean courts have also taken this view in *Thong Ah Fat*,<sup>312</sup> stating that the duty to provide reasons leads to greater care in analyzing the evidence and gives rise to sounder decisions,<sup>313</sup> or at the very least, providing the basis for it.<sup>314</sup> This process, it is contended, as well as 'acting prophylactically'<sup>315</sup> on the mind, 'guards against unconsidered or impulsive decisions.'<sup>316</sup>

The position in Australia on the duty to give reasons has been even clearer.<sup>317</sup> Australian courts have moved beyond the duty to state the reasons for decisions and onto the extent of that obligation as was the case in *Waterson v Batten*.<sup>318</sup>

<sup>307</sup> For example, trials that involve juveniles/minors are usually not open to the public.

<sup>308</sup> Alfred Denning, *The Road to Justice* (Stevens, 1955) 29. See also *Coleman v Dunlop Limited* [1998] PIQR 398, 403 (Henry LJ).

<sup>309</sup> H L Ho, 'The Judicial Duty to Give Reasons' [2006] 20 *Legal Studies: The Journal of the Society of Legal Scholars* 42.

<sup>310</sup> *Coleman v Dunlop Limited* [1998] PIQR 398, 403.

<sup>311</sup> *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, 872.

<sup>312</sup> *Thong Ah Fat v Public Prosecutor* [2012] SLR 676.

<sup>313</sup> *Ibid.*

<sup>314</sup> It has also been suggested that providing sound reasons for decisions can reduce the number of appeals, see Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] (January) *Public Law* 56, 61-15 cited in Chen Siyuan and Nicholas Poon 'The Judicial Duty to Give Reasoned Decisions' [2011] (December) *Singapore Law Watch Commentary* 3.

<sup>315</sup> *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 442.

<sup>316</sup> *Ibid.*

<sup>317</sup> Though of course there are a number of exceptions, for example in interlocutory matters and where the case is clear and straightforward, with little contention by way of facts of legal issues, see *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559, 566. Juries also do not have to provide reasons for their decisions.

<sup>318</sup> *Waterson v Batten* (13 May 1988, unreported) (NSW Court of Appeal), though Kirby P did also mention that in certain circumstances it may be impractical and unrealistic to expect delivery of written or oral grounds of decisions for every case due to the sheer number of cases, allowing for some latitude in the drafting of reasons. There is also WA authority suggesting that while Magistrates in the lower courts should provide reasons for decisions, this reasoning need not be extensive due to the sheer volume of matters handled by the lower courts, see *Garrett v Nicholson* (1999) 21 WAR 226; *Quinlan v Police* [2007] WASC 44 [126]-[127] (Johnson J).

This principle has also been reiterated in *Soulemezis v Dudley*<sup>319</sup> and *Public Service Board of New South Wales v Osmond*.<sup>320</sup> The idea is, as was put by Rawls, is that reasons for decisions that are debated, attacked and defended amount to an important restraint on the decision maker's exercise of power.<sup>321</sup> It is therefore accepted that public accountability of the branches of government that play a role in the criminal law process is a crucial and integral part of any legal system that aspires to administer justice.<sup>322</sup>

It is somewhat of an oddity then that the prosecutor has far fewer limitations and is subject to far less scrutiny.<sup>323</sup> In Australia, while publicly available policies guide the conduct of prosecutors in the exercise of their discretion, prosecutors, in general, are not required to explain their decisions and typically do not.<sup>324</sup> The rationale for a decision, to prosecute a particular case or not is rarely available and few mechanisms of review are available to the public.<sup>325</sup> This is somewhat questionable as prosecutors, though performing a very different role from judges, do make decisions on prosecutorial matters, and is arguably playing a 'quasi-judicial' role.<sup>326</sup> In light of this, it is arguable that there would be some benefit in requiring the prosecutors to give reasons for decisions. It would, in the words of Lord Donaldson, 'concentrate the mind wonderfully',<sup>327</sup> and lead to increased care in analyzing the evidence and coming to a decision on whether to prosecute or not, which charges to lay and other prosecutorial functions. Of course, and as

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<sup>319</sup> *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279.

<sup>320</sup> *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559, 566.

<sup>321</sup> J Rawls, *Theory of Justice* (Oxford University Press, 1972) 133; D L Shapiro, 'In Defence of Judicial Candor' (1987) 100 *Harvard Law Review* 731, 737, cited in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 258 (Kirby P).

<sup>322</sup> It has been noted that other government actors enjoy less power yet are subject to far more regulations than prosecutors are in Bibas, above n 13, 962.

<sup>323</sup> Though it should be noted that while there are some internal mechanisms and review, these are not widely known and not as transparent as it could be – for example in Western Australia, the DPP prosecutors are divided into Workgroups, each headed by a Workgroup Coordinator who is a Senior State Prosecutor. Presumably, prosecutorial decisions are monitored by each Coordinator, providing for some level of accountability and to ensure that 'junior prosecutors are appropriately mentored and guided'. Office of the Director of Public Prosecutions (Western Australia), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 10.

<sup>324</sup> Gans, above n 58, 60.

<sup>325</sup> Ibid. In a nolle prosequi, the Prosecutor, as a matter of practice does state publicly before the Court the reason as to why the prosecution is not proceeding on the matter, but this statement is notably brief and unelaborated.

<sup>326</sup> Krauss, above n 237; Langer, above n 244. See also page 37 of this paper that describes the prosecutor's quasi-adjudicator role in plea bargaining.

<sup>327</sup> *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, 872.

will be discussed further in this paper,<sup>328</sup> there are costs associated with having to provide reasons.

### B *Discovery Obligations*

In the pursuit of truth in criminal proceedings, parties are obliged to comply with the ‘rules of the game’.<sup>329</sup>

[S]ince it is impossible to equip both the prosecution and the defence with the same investigative facilities the only reasonable way to attain advance equality in access to the evidence is through the ‘system’, that is through a discovery procedure.<sup>330</sup>

In the criminal justice system, the vast resources of the State are pitted against the individual defendant. Imposing disclosure obligations on the prosecution allows for the accused to have access to the evidence relevant to his/her case.<sup>331</sup> This ensures that the accused is aware of the case to be met and is able to adequately prepare their defence.<sup>332</sup> Also, and on a more practical note, discovery assists in resolving non-contentious and time-consuming issues ahead of trial and to encourage the entering of guilty pleas at an early stage.<sup>333</sup>

In the United Kingdom, there was a series of highly publicized, controversial cases in the late 1980s and early 1990s that highlighted the importance of disclosure obligations in the conduct of a fair trial. ‘Kiszko’,<sup>334</sup> the ‘Maguire

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<sup>328</sup> See pages 68-79 of this paper.

<sup>329</sup> V S Winslow, ‘Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia’ (1989) 31 *Malaya Law Review* 1.

<sup>330</sup> Law Reform Commission of Canada, *Study Report: Discovery in Criminal Cases* (Working Paper, 1974).

<sup>331</sup> New South Wales Law Reform Commission, *Procedure from Charge to Trial: Specific Problems and Proposals* (Discussion Paper on Criminal Procedure vol 1, 1987) [4.69].

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> See *R v Kiszko* (1991) The Times, 18 February 1992, 5 and *R v Kiszko* (1978) 68 Cr App R 62 for the first appeal. Kiszko is a vivid example of apparent deliberate police non-disclosure. Kiszko, who had an intellectual disability, was convicted in relation to the sexual assault and brutal murder of a girl on the basis of questionable and later retracted admissions that he made in interview. However, crucial forensic evidence was withheld that actually showed Kiszko’s innocence. He spent 16 years in prison before his eventual release but died soon after, see further J Niblett, *Disclosure in Criminal Proceedings* (London, Sweet & Maxwell, 1996) 21; G Tibballs,

Seven',<sup>335</sup> the 'Taylor sisters',<sup>336</sup> the 'Birmingham Six',<sup>337</sup> the 'Guildford Four',<sup>338</sup> and 'Judith Ward',<sup>339</sup> all involved non-disclosure of significant material by the prosecution which resulted in a miscarriage of justice. In response,<sup>340</sup> the English courts saw an expansion of the prosecution's disclosure obligations from *R v Saunders*,<sup>341</sup> *R v Maguire*<sup>342</sup> and culminating in *R v Ward* where it was held that any material gathered by the prosecution was capable of disclosure.<sup>343</sup>

In Australia, 'miscarriages of justice due to non-disclosure have not occurred with same degree of frequency nor sensationalism [so] as to cause an appellate court to act so decisively'.<sup>344</sup> That has however, changed with *R v Mallard*.<sup>345</sup> In *Mallard*, it was conceded by the prosecution on appeal to the High Court that the nondisclosure of certain materials had breached the DPP's Statement of Prosecution Policy and Guidelines that had been made and gazetted pursuant to the *Director of Public Prosecutions Act 1991* (WA).<sup>346</sup> Kirby J adopted the following statement as representing an accurate position of the common law in Australia:

The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its

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*Legal Blunders* (Robinson, 2000) 249-254; Jonathan Rose and Steve Panter, *Innocents: How Justice Failed Stefan Kiszko and Lesley Molseed* (Fourth Estate, 1997) cited in David Plater, *The Changing Role of the Modern Prosecutor: has the notion of the 'Minister of Justice' Outlived its Usefulness?* (PhD Thesis, The University of Tasmania, 2011) 186-226.

<sup>335</sup> *R v Maguire* [1992] 1 QB 936.

<sup>336</sup> *R v Taylor & Taylor* (1994) 84 Cr App R 361.

<sup>337</sup> *R v McKenny* (1991) 93 Cr App R 287.

<sup>338</sup> *R v Richardson* (1989), *The Times*, 20 October 1989.

<sup>339</sup> *R v Ward* [1993] 1 WLR 619.

<sup>340</sup> As noted in Plater, above n 332, 186-226.

<sup>341</sup> (Unreported, Central Criminal Court, Henry J, 29 August 1989).

<sup>342</sup> [1992] 1 QB 936.

<sup>343</sup> *R v Ward* [1993] 1 WLR 619, 645.

<sup>344</sup> M Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25 *Criminal Law Journal* 121, 132.

<sup>345</sup> (2005) 224 CLR 125.

<sup>346</sup> *Ibid* 219.



possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed<sup>347</sup>

The High Court confirmed the formal and wide duty of disclosure that the prosecution should comply with and that the Statement of Prosecution Policy and Guidelines served to complement the common law duty in this regard.<sup>348</sup> The prosecution's failure to meet its disclosure obligation may lead to an order that the conviction be quashed, as was the case in *Mallard*.<sup>349</sup> Additionally, in Western Australia, following a number of recommendations (albeit many years later),<sup>350</sup> Parliament has since introduced statutory provisions that have strengthened the disclosure obligations.<sup>351</sup> These disclosure obligations are also reflected in the DPP's own Statement of Policy and Guidelines.<sup>352</sup>

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<sup>347</sup> (2005) 224 CLR 125, 153 (Kirby J); Kirby P adopted this from Lord Hope's statement in *R v Winston Brown* [1998] AC 367, 377 (Lord Hope).

<sup>348</sup> *R v Mallard* (2005) 224 CLR 125, 150 (Kirby J).

<sup>349</sup> Ibid.

<sup>350</sup> The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Report No 92 (1999); Robert Mazza, 'Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia' (Paper presented at the Australian Institute of Judicial Administration, Criminal Justice Conference, Sydney, 7-9 September 2011).

<sup>351</sup> *Criminal Procedure Act 2004* (WA) ss 42, 61 and 95; See Criminal Procedure Bill 2004; Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 August 2004, 5722-5726 (Jim McGinty, Attorney General). The raising of disclosure obligations was done alongside the abolition of the Committal Hearings (Preliminary Hearing in WA) process. Higher disclosure obligations by the prosecution were thought to at least alleviate some of the concerns raised by critics that the abolition of Preliminary Hearings would bring about. A summary of the current system was articulated by the Court in *Re Grinter; Ex parte Hall* (2004) 28 WAR 427, 471 [191] which noted: 'Parliament has replaced the preliminary hearing...The transfer of power over prosecution decisions before trial is complete. The role of the grand jury and committing magistrate has been entirely replaced by the functions of the Director of Public Prosecutions and a statutory duty of disclosure'.

<sup>352</sup> See Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1999) <[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)> [101]-[118]. The ODPP in other states have similar provisions:

Office of the Director of Public Prosecutions (SA), *Prosecution Policy* (1999) <[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)>;

Office of the Director of Public Prosecutions (Vic), *Prosecutorial Guidelines* (1993) <<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>>;

Office of the Director of Public Prosecutions (Qld), *Statement of Prosecution Policy and Guidelines* (1995) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)> 39-43;

Office of the Director of Public Prosecutions (NT), *Guidelines and Exercise of General Prosecutorial Discretion* (1991) <<http://www.nt.gov.au/justice/dpp/html/guidelines.html>>; [8.1]-[8.18];

Office of the Director of Public Prosecutions (NSW), *Office of Director of Public Prosecutions Guidelines* (2007)

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)> 30-32;

Australia and Singapore have both evinced a general reluctance to interfere with functions of prosecutorial discretion. Australian courts do not purport to exercise control over the commencement or continuation of criminal proceedings, save where it is necessary to prevent an abuse of process or to ensure a fair trial.<sup>353</sup> In a number of cases, the courts have confirmed the position that the decision whether or not to prosecute a case is not susceptible to judicial review.<sup>354</sup> This stems from *R v Maxwell* where the High Court held that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review.<sup>355</sup> They include decisions whether or not to prosecute,<sup>356</sup> to enter a nolle prosequi,<sup>357</sup> to proceed ex officio,<sup>358</sup> whether or not to present evidence<sup>359</sup> and decisions as to the particular charge to be laid or prosecuted.<sup>360</sup> As observed in *Maxwell*:

The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.<sup>361</sup>

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Office of the Director of Public Prosecutions (ACT), *Prosecution Policy and Guidelines of the Director of Public Prosecutions* (1991)

<[http://www.dpp.act.gov.au/about\\_the\\_dpp/the\\_prosecution\\_policy](http://www.dpp.act.gov.au/about_the_dpp/the_prosecution_policy)>;

Office of the Director of Public Prosecutions (Tas), *Director of Public Prosecution Guidelines* (1994) <[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)>;

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)>.

<sup>353</sup> *Barton v The Queen* (1980) 147 CLR 75, 90-1, 96.

<sup>354</sup> *Ibid* 94; *R v Jewitt* [1985] 2 SCR 128, 139-140.

*Hanna v Director of Public Prosecutions* [2005] NSWSC 134 [40]. It is also difficult to get a mandamus against any body with prosecutorial or quasi-prosecutorial functions or powers to force it to take action, see Hannes Schoombie and Lee McIntosh, 'Watching over the Watch-Dogs: Regulatory Theory and Practice, with Particular Reference to Environmental Regulation' (Paper presented at the Australian Institute of Administrative Laws Annual Conference, 4-5 July 2002).

<sup>355</sup> *Maxwell v The Queen* (1996) 184 CLR 501.

<sup>356</sup> *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1277; *Director of Public Prosecutions v Humphrys* [1977] AC 1, 46; *Barton v The Queen* (1980) 147 CLR 75, 94-5, 110.

<sup>357</sup> *R v Allen* (1862) ER 929; *Barton v The Queen* (1980) 147 CLR 75, 90-1.

<sup>358</sup> *Barton v The Queen* (1980) 147 CLR 75, 92-3, 104, 107, 109.

<sup>359</sup> *R v Apostilides* (1984) 154 CLR 563, 575.

<sup>360</sup> *R v McCready* (1985) 20 A Crim R 32, 39; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593, 604-5 cited in *Maxwell v The Queen* (1996) 184 CLR 501 (emphasis added).

<sup>361</sup> *Maxwell v The Queen* (1996) 184 CLR 501, 534.

Similarly, the selection of the appropriate charges to proceed with is a matter with which the court will not usually interfere with.<sup>362</sup> This position may even extend (as is notoriously common in drug offences) to decisions to particularize in the charge the amount of a prohibited drug as this is a matter for prosecutorial discretion. In *Matthews v Greene*, the Court held that ‘it may be that, as with the choice of a charge, the exercise of this prosecutorial discretion will be a matter with which courts are reluctant to intervene’.<sup>363</sup>

The court can, however, in limited circumstances where the bringing of criminal proceedings are themselves oppressive and an abuse of process, embark upon a preliminary enquiry and stay proceedings.<sup>364</sup> It should however be emphasized that this power stems from the court’s inherent jurisdiction to protect its own processes from abuse and is not an opportunity for the judge to stray beyond a judicial role.<sup>365</sup> In the words of McKechnie J:

A Judge is not a Director of Public Prosecutions. It is not enough for a Judge to conclude that were he or she to exercise the prosecutorial discretion, in accordance with published prosecutorial guidelines, an indictment would not be presented or would be discontinued. A Judge can only exercise the power if satisfied that the processes of the Court, having been invoked, cannot continue in the interests of justice... In deciding the interests of justice require a stay of an indictment *a judge should be careful not to stray beyond a proper judicial role. The institution and continuation of judicial proceedings is a wholly executive function.*<sup>366</sup>

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<sup>362</sup> *Chung v The Queen* (2007) 175 A Crim R 579, 589–591.

<sup>363</sup> Ibid [54]–[61] (Spigelman CJ); *Matthews v Greene* (2011) WASC 258 [68].

<sup>364</sup> *R v Bow Street Magistrates; Ex parte Mackeson* (1981) 75 Cr App R 54; *R v Riebold* [1967] 1 WLR 674; *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1296, 1347; *Herron v McGregor* (1986) 6 NSWLR 246; However, in *Jago v District Court of New South Wales* (1989) 168 CLR 23 the court held that the general principle is that a permanent stay of proceedings will only be granted in exceptional circumstances; *Williams v Spautz* (1992) 174 CLR 509 which lays out the ‘dominant purpose test’ which should be applied to determine the purpose of prosecution, though it has been noted that it is difficult for an accused to establish that the DPP instituted proceedings for an improper purpose, see Colvin and McKechnie, above n 10, 703.

<sup>365</sup> *Salmat Document Management Solutions Pty Ltd v R* [2006] WASC 65.

<sup>366</sup> Ibid [36]–[37], [41]–[42] (emphasis added).

The respective Director of Public Prosecutions Acts authorize the function of prosecutions to be carried out by the Director.<sup>367</sup> The institution and continuation of criminal proceedings is thus a wholly executive function. As is made clear in *Maxwell* and the aforementioned cases, decisions made by the prosecution are seldom subject to judicial review.<sup>368</sup>

A number of challenges to the Attorney-General's prosecutorial discretion have also come before the courts in Singapore. The current position is that the Attorney-General is vested with prosecutorial discretion, entrusted with this function as the Public Prosecutor by virtue of the Constitution. The courts have evinced a general reluctance to interfere with this, as seen in cases such as *Ong Chin Keat Jeffrey*<sup>369</sup>, *Sim Min Teck*,<sup>370</sup> *Thiruselvam*<sup>371</sup> and *Ramalingam Ravinthran*,<sup>372</sup> which are discussed below.

### 1 Prosecutorial Malpractice and Abuse

In *Ong Chin Keat Jeffrey*,<sup>373</sup> the Court had to consider the power to stay criminal proceedings as a check against alleged Executive malpractice. The Court considered the English cases of *R v Horseferry Road Magistrate's Court*<sup>374</sup> and *R v Latif*<sup>375</sup> and acknowledged the need 'to balance the need to try those accused of serious crimes with a competing public interest to ensure that the courts did not endorse malpractice by the Executive'.<sup>376</sup> The judge however, went on to note that these were a distinctly English approach influenced by the European Convention on Human Rights,<sup>377</sup> and 'these developments within Europe are not

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<sup>367</sup> *Director of Public Prosecutions Act 1983* (Cth) ss 6(1)(a), (c), (d), 9 (5); *Director of Public Prosecutions Act 1990* (NT) ss 12, 13; *Director of Public Prosecutions Act 1986* (NSW) ss 8, 9; *Director of Public Prosecutions Act 1991* (WA) ss 11, 12; *Director of Public Prosecutions Act 1984* (Qld) s 10(1)(a); *Director of Public Prosecutions Act 1973* (Tas) s 12(1)(a); *Public Prosecutions Act 1994* (Vic) s 22(1); *Director of Public Prosecutions Act 1991* (SA) s 7(1)(i).

<sup>368</sup> *Maxwell v The Queen* (1996) 184 CLR 501.

<sup>369</sup> *Public Prosecutor v Ong Chin Keat Jeffrey* [2004] SGDC 130.

<sup>370</sup> *Sim Min Teck* [1987] SLR(R) 65.

<sup>371</sup> *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 2 SLR 125.

<sup>372</sup> *Ramalingam Ravinthran v Attorney-General* [2012] SLR 59.

<sup>373</sup> [2004] SGDC 130.

<sup>374</sup> [1994] 1 AC 42.

<sup>375</sup> [1996] 1 WLR 104.

<sup>376</sup> *Public Prosecutor v Ong Chin Keat Jeffrey* [2004] SGDC 130 [79].

<sup>377</sup> *Ibid* [81].

replicated in Singapore’.<sup>378</sup> Accordingly then, the Singapore position can be distinguished from these cases in favour of ‘local conditions’ that preserve the ‘fundamental values of Singapore society’.<sup>379</sup> This decision affirms the broad discretion vested in the Public Prosecutor in Singapore and perhaps more significantly, its distinctly local flavour.<sup>380</sup>

## *2 Prosecutorial Discretion and Equality*

### *(a) Sim Min Teck v Public Prosecutor*

In *Sim Min Teck*,<sup>381</sup> the appellant was charged with murder, while his accomplice faced the lesser offence of culpable homicide not amounting to murder. The appellant argued that this was in breach of Article 12(1) of Singapore’s Constitution which provides for equality before the law and equal protection of the law. The issue in contention was that unlawful possession of firearms and ammunition was not a capital offence under the *Arms Act*<sup>382</sup> but was under the *Internal Security Act*.<sup>383</sup> The prosecution could thus select charges from two distinct provisions, each with varying penalties. The Attorney-General chose to proceed with a charge under the *Internal Security Act*, and this was challenged on grounds of a breach of Article 8 of the Constitution of Malaysia, the Malaysian equivalent of Singapore’s Article 12,<sup>384</sup> which provides for equality and equal protection under the law. The Court quoted Lord Diplock’s statement in *Teh Cheng Poh*, stating that:

[t]here are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the

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<sup>378</sup> Ibid.

<sup>379</sup> *AG v Wain* [1991] SLR 383, 394, [34], and *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689 issued on 11 July 1994 respectively.

<sup>380</sup> Thio Li-Ann, ‘Administrative and Constitutional Law’ [2004] 5 *Singapore Academy of Law Annual Review* 1, 20.

<sup>381</sup> *Sim Min Teck v Public Prosecutor* [1987] SLR(R) 65.

<sup>382</sup> *Arms Act 1960* (Malaysia).

<sup>383</sup> *Internal Security Act 1960* (Malaysia).

<sup>384</sup> *Federal Constitution* (Malaysia) art 12.

lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.<sup>385</sup>

The Court thus reaffirmed the doctrine that so long as irrelevant considerations do not influence prosecution decisions, the Public Prosecutor is empowered to ‘institute, conduct or discontinue any proceedings for any offence’,<sup>386</sup> and in the exercise of that discretion, may consider a myriad of factors. The Court did not go on to indicate any factors that should be considered by the prosecution and perhaps in doing so, deliberately left such matters for the prosecution to decide on. Arguably, this evinces a judicial reluctance to interfere with the prosecutor’s role in the conduct of criminal proceedings.

*(b) Thiruselvam s/o Nagaratnam v Public Prosecutor*

In *Thiruselvam s/o Nagaratnam*,<sup>387</sup> the appellant faced a capital charge of abetment for trafficking 807.6 grams of cannabis, where the principal offender was charged (and pleaded guilty) in a separate trial on two non-capital charges for supplying cannabis.<sup>388</sup> Again, the argument raised by the appellant was that this differentiation of charges for essentially the same set of facts constituted a breach of Article 12(1) of Singapore’s Constitution.<sup>389</sup> The Court of Appeal held that there was no such breach and dismissed the appeal accordingly. In its decision, the Court again cited the Privy Council’s reasoning in *Teh Cheng Poh*.<sup>390</sup>

In *Thiruselvam*, Thean JA considered *Sim Min Teck* and concluded that:

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<sup>385</sup> *Teh Cheng Poh v PP* [1979] 1 MLJ 50, 56 (Lord Diplock); *Sim Min Teck v Public Prosecutor* [1987] SLR(R) 65, 69.

<sup>386</sup> [1987] SLR(R) 65, 68 [9].

<sup>387</sup> [2001] 2 SLR 125.

<sup>388</sup> *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 2 SLR 125.

<sup>389</sup> *Republic of Singapore Constitution* (Singapore) art 12(1).

<sup>390</sup> *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50.

'[t]he principle remains the same. The prosecution has a wide discretion to determine what charge or charges should be preferred against any particular offender, and to proceed on charges of different severity as between different participants of the same criminal acts'.<sup>391</sup>

Again the Court affirmed in no uncertain terms that it is for the Attorney-General, as Public Prosecutor, to make the determination on what charge or charges to proceed with. Indeed, the Courts' unflinching stance in this area has resulted in academics noting that that future appeals '...may be doomed to an even more spectacular rejection as the last resort of an appellant'.<sup>392</sup>

*(c) Ramalingam Ravinthran v Attorney-General*

In *Ramalingam Ravinthran*,<sup>393</sup> two men were arrested for trafficking 5560.1 grams of cannabis and 2078.3 grams of cannabis mixture. Ramalingam's accomplice, Sundar was charged with trafficking 499.99 grams of cannabis, 999.99 grams of tetrahydrocannabinol and cannabinal and was jailed for 20 years and given 24 strokes of the cane, narrowly escaping the mandatory death penalty threshold amount.<sup>394</sup> Ramalingam was charged with the full 5560.1 grams and faced the mandatory death penalty.<sup>395</sup> Ramalingam filed a motion to question if the Attorney-General had deprived him of his right to fair treatment and sought to have his charges amended.

Counsel for the appellant argued that it was 'patently irrational'<sup>396</sup> for the prosecution to have charged Sundar with trafficking a lesser amount of drugs than the amount which he had actually delivered to the Applicant because this 'defie[d] the physical laws of nature'.<sup>397</sup> In so doing, the prosecution 'ignored

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<sup>391</sup> *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 2 SLR 125.

<sup>392</sup> *Ibid* 8.

<sup>393</sup> *Ramalingam Ravinthran v Attorney-General* [2012] SLR 59.

<sup>394</sup> See *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008) sch 2 which gives the threshold amounts for which the mandatory death penalty would apply, for example in the case of cannabis, unauthorized trafficking in the amount of more than 500 grams would attract the mandatory death penalty.

<sup>395</sup> *Ramalingam Ravinthran v Attorney-General* [2012] SLR 49 [6].

<sup>396</sup> *Ibid* 73 [57].

<sup>397</sup> *Ibid*.

reality, or rather, created its own reality’,<sup>398</sup> in order to reduce the gravity of the charges against Sundar and, correspondingly, the severity of the punishment he would face. Such a decision, it was argued, could not be within the legitimate discretion of the Attorney-General. One of the questions raised was whether it is within the Attorney-General’s prosecutorial discretion to ‘salami slice’ threshold amounts for the purposes of laying charges.<sup>399</sup>

The Court held that the prosecutorial power is a constitutional power vested in the Attorney-General pursuant to Article 35(8) of the Constitution. It is constitutionally equal in status to the judicial power set out in Article 93. Referring to *Law Society of Singapore v Tan Guat Neo Phyllis*,<sup>400</sup> the Court in *Ramalingam* stated that:

... These two provisions expressly separate the prosecutorial function from the judicial function, and give equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other’s functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally. Indeed, this is not even a true ‘interference’ inasmuch as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the Constitution itself) to prevent.<sup>401</sup>

Citing a number of United States’ cases,<sup>402</sup> the Court held that in view of the high Office of the Attorney-General, courts should proceed on the basis that when the Attorney-General initiates a prosecution against an offender (regardless of

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<sup>398</sup> Ibid [50].

<sup>399</sup> As opined by V J Rajah JA in Teo Xuanwei, ‘Two men caught with drugs but they faced different amounts: Lawyer challenges AGC’s decision to charge one with bringing in smaller amount of drugs’, *Today* (Singapore), 10 November 2011, 34.

<sup>400</sup> *Law Society of Singapore v Tan Guat Neo Phyllis* (2008) SLR(R) 239.

<sup>401</sup> Ibid 311 [144] (Chan Sek Keong CJ); *Ramalingam Ravinthran v Attorney-General* [2012] SLR 59, 67 [43].

<sup>402</sup> For example in *Inmates of Attica Correctional Facility v Nelson A Rockefeller*, 477 F 2d 375, 379-380 (1973); *United States v Cox*, 342 F2d 171 (1965); *United States v Christopher Lee Armstrong*, 517 US 456 (1996); In *United States v Chemical Foundation*, 71 LEd 131 (1926) it was held that ‘[t]he presumption of regularity supports’ their prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties’.



whether he was acting alone or in concert with other offenders), the Attorney-General does so in accordance with the law. In other words, the courts should presume that the Attorney-General's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise.

Prosecutorial discretion however, is not without its limits. The Court reiterated the position in *Chng Suan Tze v Minister for Home Affairs* that all legal powers are subject to limits.<sup>403</sup> An inherent limitation on the prosecutorial power is that it may not be exercised arbitrarily, and may only be used for the purpose for which it was granted and not for any extraneous purpose.<sup>404</sup> However, in cases where several offenders are involved in the same or similar offences committed in the same criminal enterprise, the Attorney-General may take into account a myriad of factors in determining whether or not to charge an offender and what charges are to be brought. These factors include the legal guilt of the offender, the moral blameworthiness, the gravity of the harm caused, the question of whether there is sufficient evidence against the offender and his/her co-offenders (if any), their personal circumstances, the willingness of one offender to testify against his co-offenders and other policy factors.<sup>405</sup> Where relevant, these factors may justify offenders in the same criminal enterprise being prosecuted differently.<sup>406</sup>

Insofar as the equality provisions of Article 12(1) of the constitution are concerned, it is sufficient that the Attorney-General gives unbiased consideration to every offender and avoids taking into account any irrelevant consideration.<sup>407</sup> This, coupled with the presumption of legality and constitutionality that the Office of the Attorney-General enjoys necessitates that any claim for a breach the equality provisions of Article 12(1) of the Constitution adduce prima facie evidence of the contrary. Without this, the legality and constitutionality of the Attorney-General's decisions in prosecutions are presumed, and the courts should be slow to interfere with this.

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<sup>403</sup> *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 [86].

<sup>404</sup> *Ramalingam Ravinthran v Attorney-General* [2012] SLR 59, 71 [51]; *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 [149].

<sup>405</sup> *Ramalingam Ravinthran v Attorney-General* [2012] SLR 59.

<sup>406</sup> *Ibid* [52].

<sup>407</sup> *Ibid* [51] and *Teh Cheng Poh v PP* [1979] 1 MLJ 50, 56.

As argued, it would seem that the courts in Singapore have upheld the ‘legal erection of a high and virtually impregnable barrier around the Attorney-General’s constitutional prerogative [of] prosecutorial discretion’,<sup>408</sup> similar to comparable commonwealth jurisdictions.<sup>409</sup> The presumption of constitutionality and legality afforded to the Attorney-General imposes additional burden for the aggrieved accused and given the courts reluctance to interfere with the Attorney-General’s prosecutorial discretion, it may be necessary to examine whether safeguards to prosecutorial discretion may be found elsewhere.

#### *D Guiding the Discretion*

Discretion can dangerously be synonymous with unchecked power.<sup>410</sup> The worry is that the prosecutor, being only human, is subject to the imperfections of human nature that may be reflected in the choices made.<sup>411</sup> Research suggests that prosecutors may bring to bear their personal biases in the exercise of their discretion.<sup>412</sup> It is the ‘personal synthesis of factors by the decision maker’<sup>413</sup> and as such can often be secretive and unaccountable. Unbridled prosecutorial discretion ‘makes easy the arbitrary, the discriminatory and the oppressive. It produces ‘inequality of treatment...and offers a fertile bed for corruption’.<sup>414</sup>

Even if it were to be assumed, optimistically, that the discretion would at all times be exercised in good faith and with honesty, the decision to prosecute often involves evidential or legal issues that are matters of professional judgment and inevitably involve a degree of subjectivity.<sup>415</sup> Accordingly, different prosecutors

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<sup>408</sup> Chen Siyuan, ‘Prosecutorial Discretion Revisited’ [2012] (April) *Singapore Law Watch Commentary* 2.

<sup>409</sup> Albert Chen, ‘Prosecutorial Discretion, Independence, and Accountability’ (1998) 28 *Hong Kong Law Journal* 406; Benjamin Berger, ‘The Abiding Presence of Conscience: Criminal Justice against the Law and the Modern Constitutional Imagination’ (2011) 61 *University of Toronto Law Journal* 579 cited in Chen Siyuan, ‘Prosecutorial Discretion Revisited’ [2012] (April) *Singapore Law Watch Commentary* 2.

<sup>410</sup> Simons, above n 21, 899.

<sup>411</sup> Davis, above n 32; Poulin, above n 30, 1072.

<sup>412</sup> Kenneth J Melilli, *Prosecutorial Discretion in an Adversary System* [1992] *Brigham Young University Law Review* 669, 685-91; Poulin, above n 30, 1080.

<sup>413</sup> Refshauge, above n 26, 359.

<sup>414</sup> Charles D Breital, ‘Controls in Criminal Law Enforcement’ (1960) 27 *University of Chicago Law Review* 427, 429.

<sup>415</sup> HM Crown Prosecution Service Inspectorate, *A report on the joint inspection into the investigation and prosecution of cases involving allegations of rape* (2002) 45 [8.5]; See also

may take different perspectives on a matter.<sup>416</sup> One senior prosecutor acknowledges that the prosecution service is a ‘human institution’,<sup>417</sup> and ‘no-one makes correct decisions all of the time’,<sup>418</sup> further noting that cases with circumstantial evidence can often lead to different inferences and different perspectives can lead to different decisions.<sup>419</sup>

Finally, there is the issue of perception and public confidence in the criminal justice system. Prosecutorial discretion must not only be exercised in good faith, free of personal, emotional and political influences, but must be seen to be so. Its exercise must be seen to be consistent with some fair and transparent standards. There must be a ‘minimum level’ of transparency and accountability in accordance with society’s demands. This would in turn lend confidence to the notion that prosecutorial discretion is more than the mere arbitrary will of the prosecutor.

The situation begets the question: given the prosecutor’s status as ‘gate keeper’ of the criminal justice system and the potential of the discretion to effect justice or injustice, what safeguards are in place to ensure the exercise of this discretion is carried out and seen to be carried out with consistency and not used capriciously or even maliciously? How does one ensure that it is ‘not arbitrary, vague and fanciful, but legal and regular... and exercised within the limit to which an honest man, competent in the discharge of his/her office ought to confine himself?’<sup>420</sup>

### 1 *Prosecutorial Guidelines*

In a statement made by Sir Hartley Shawcross, the then Attorney-General of the UK, before the House of Commons:

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House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System: Ninth Report of Session 2008-2009* (2009) 44-47 which comments on the lack of consistency in the Crown Prosecution Service.

<sup>416</sup> Ibid.

<sup>417</sup> Lievore, above n 50, 6.

<sup>418</sup> Ibid.

<sup>419</sup> Ibid.

<sup>420</sup> *Sharp v Bishop of Wakefield* [1981] 1 AC 173, 179 (Lord Halsbury).

It has never been the rule in this country – I hope it will never be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulation under which the Director of Public Prosecution worked provided that he should intervene to prosecute, amongst other cases:

‘wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest’.

That is the dominant consideration...<sup>421</sup>

While the statement was made for an English audience, the statement has been referred to by commentators in Australia and has been influential in shaping the prosecutorial landscape in Australia.<sup>422</sup> This has translated into the initial conceptualization of two elements: first, is there sufficient evidence to justify a prosecution and second, is such a prosecution necessary in the public interest?<sup>423</sup>

#### (a) *The Evidentiary Sufficiency*

The first element of ‘sufficient evidence’ has been the source of some contention. Upon initial interpretation, it was ‘fashionable’ for this to mean a *prima facie* case.<sup>424</sup> This approach was however, unsatisfactory as it was evident that a mere *prima facie* case was often insufficient for a jury to find a guilty verdict.<sup>425</sup> Given the growing number, and length of criminal trials, it was felt that to commit limited resources to cases that would not likely see a conviction was, at best, unwise.<sup>426</sup> Thus, by the mid-1980s the switch to a ‘reasonable prospect of conviction’ standard was thought to be more appropriate as it conserved limited resources and lowered the risk that an innocent person would be prosecuted.<sup>427</sup>

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<sup>421</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 29 January 1951, vol 483, col 681; Also, about the same time when Australia undertook the establishment of its Director of Public Prosecutions, the United Kingdom underwent similar reforms, creating its own Crown Prosecution Service, see Ashworth and Redmayne, above n 225, 174-178.

<sup>422</sup> Ross, above n 8, 347; Bugg, above n 109; Refshauge, above n 26, 361.

<sup>423</sup> Rozenes, above n 39; Refshauge, above n 26, 361.

<sup>424</sup> Rozenes, above n 39.

<sup>425</sup> Bugg, above n 156.

<sup>426</sup> *Ibid.*

<sup>427</sup> Ian Temby, ‘Prosecution Discretion and the Director of Public Prosecutions Act 1983’ (1985) 59 *Australian Law Journal* 197; Refshauge, above n 26, 361.

A ‘reasonable prospect of conviction’<sup>428</sup> was thus deemed to be a more appropriate test. This was interpreted as ‘rather more likely than not that the prosecution will result in a conviction’,<sup>429</sup> or the ‘51% rule’.<sup>430</sup> In the application of this test, the prosecutor must not only consider whether or not the court would convict based on the evidenced adduced by the prosecution, but must also take into account the impact of any likely defence, the impact of any witnesses on the jury and a number of factors that could affect the outcome of a trial in order to determine whether or not the prosecution, if initiated, would ‘more likely than not’ result in conviction.<sup>431</sup> This test was criticized as in some cases, a prosecutor, no matter how experienced, will simply be unable to say whether a conviction or acquittal is the more likely result.<sup>432</sup> This ‘51%’ rule can also pose a problem in sexual assault cases, where it is often a matter of ‘he said versus she said’, falling short of the necessary 51% threshold.<sup>433</sup> In the 1986 guidelines, an attempt was thus made to rectify the issues by subsuming the sufficiency of evidence test with ‘public interest considerations’ so that whether a conviction was the more likely result became the dominant factor in determining whether the public interest required a prosecution.<sup>434</sup> This approach however, was also unsatisfactory as the incorporation of the sufficiency of evidence test with public interest considerations was deemed artificial and difficult to apply in practice.<sup>435</sup>

So it was in the 1990 version of the guidelines that the Commonwealth adopted the view taken by the Victorian Shorter Trials Committee.<sup>436</sup> The Committee found that the ‘reasonable prospects of conviction’ should not be equated with a 51% chance of conviction being sustained. It may be something less than that and

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<sup>428</sup> Attorney-General’s Department, *Prosecution Policy of the Commonwealth* (1982) [16]; Commonwealth Director of Public Prosecutions, *Steps in the Commonwealth Prosecution Process* <<http://www.cdpp.gov.au/Practice/Prosecution-Process.pdf>> [2]; Rozenes, above n 39; Temby above n 426, 198.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> Rozenes, above n 39.

<sup>432</sup> Ibid.

<sup>433</sup> As mentioned earlier, private prosecution has since been discontinued in WA. Given this, where the Prosecution has decided not to proceed with a matter, the only option left to the victim of a sexual assault case is civil action against the perpetrator. Studies have shown that prosecutors’ charging decisions in sexual assault cases were often guided by the likelihood of conviction, see Spohn and Holleran, above n 45.

<sup>434</sup> Rozenes, above n 39, 7-8.

<sup>435</sup> Ibid 8.

<sup>436</sup> Ibid 9.

is not appropriately expressed in mathematical terms'.<sup>437</sup> Additionally, the 'reasonable prospect of conviction' test was the test adopted by the Victorian and New South Wales Directors of Public Prosecution, and at a general meeting of State and Territory Directors of Public Prosecutors, it was thought desirable for all jurisdictions to operate under this same test.<sup>438</sup>

(b) *The Public Interest*

A second set of considerations is often also taken into account in the exercise of a prosecutor's discretion. This asks that the prosecutor to look at possible mitigating factors not adequately presented in the substantive law.<sup>439</sup> These extra-evidential factors are known as 'public interest' considerations,<sup>440</sup> and also found their way in the uniform guidelines in Australia.<sup>441</sup> The cases envisaged are often ones where the harmfulness of the conduct was relatively low, or where the offender's culpability was low, including cases of 'genuine mistake or misunderstanding' or where the offender is elderly or suffers from a mental

<sup>437</sup> Victorian Shorter Trials Committee, *Report on Criminal Trials* (Australia Institute of Judicial Administration, 1985) [3.53].

<sup>438</sup> Commonwealth Director of Public Prosecutions, above n 90;

Office of the Director of Public Prosecutions (ACT), *Prosecution Policy and Guidelines of the Director of Public Prosecutions* (1991)

<[http://www.dpp.act.gov.au/about\\_the\\_dpp/the\\_prosecution\\_policy](http://www.dpp.act.gov.au/about_the_dpp/the_prosecution_policy)>;

Office of the Director of Public Prosecutions (NT), *Guidelines and Exercise of General Prosecutorial Discretion* (1991) <<http://www.nt.gov.au/justice/dpp/html/guidelines.html>>;

Office of the Director of Public Prosecutions (Qld), *Statement of Prosecution Policy and Guidelines* (1995) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)>;

Office of the Director of Public Prosecutions (SA), *Prosecution Policy* (1999) <[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)>;

Office of the Director of Public Prosecutions (Tas), *Director of Public Prosecution Guidelines* (1994) <[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)>;

Office of the Director of Public Prosecutions (Vic), *Prosecutorial Guidelines* (1993) <<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aab79d/2-The-Prosecutorial-Discretion.aspx>>;

Office of the Director of Public Prosecutions (NSW), *Office of the Director of Public Prosecutions Guidelines* (2007)

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)>;

Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1999) <[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)>.

These guidelines are available from each of the respective Director of Public Prosecution's websites; Rozenes, above n 39, (note 20).

<sup>439</sup> Hor above n 4, 509.

<sup>440</sup> Jones Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 120-129, 413-434; Ashworth and Redmayne, above n 225, 159-194.

<sup>441</sup> Refshauge, above n 26, 361.

illness. Given the theory of proportionality,<sup>442</sup> it is considered not in the public interest to institute full prosecution against these individuals,<sup>443</sup>

However, it is important to note that these ‘public interest’ considerations are the next step of a two-stage process. The prosecutor must first be satisfied that there is a ‘reasonable prospect of securing a conviction’. If this test is not met, public interest considerations, no matter how compelling, are irrelevant.<sup>444</sup> The 12 factors featured in the guidelines include matters such as the seriousness or triviality of the offence, aggravating or mitigating circumstances, age, medical condition, prevalence or obsolescence of the offence, consequences of conviction, cost and expenses of a trial and public confidence in the criminal justice system.<sup>445</sup> These guidelines also provide for the institution and conduct of prosecutions,<sup>446</sup> the control of prosecutions,<sup>447</sup> including their discontinuance,<sup>448</sup> declining to proceed after committal,<sup>449</sup> indemnities,<sup>450</sup> charge bargaining<sup>451</sup> and the choice of charges to be laid.<sup>452</sup>

## 2 *The Effect of Prosecutorial Guidelines*

In Australia, the primary mechanism for the control of discretion by prosecutors to ensure its fair and accountable exercise is in the form of publicly promulgated guidelines.<sup>453</sup> This is largely in line with the *United Nations Guidelines on the Role of Prosecutors* requiring prosecutors vested with discretionary functions to provide guidelines for the exercise of such powers so as to ensure consistency and

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<sup>442</sup> A von Hirsch and A Ashworth, *Principled Sentencing* (2<sup>nd</sup> ed, 1998) Ch 4.

<sup>443</sup> Ashworth and Redmayne, above n 226, 185.

<sup>444</sup> Rozenes, above n 39.

<sup>445</sup> See for example, Commonwealth Director of Public Prosecutions, above n 90 [2.10] which is also reflected in the respective Directors of Public Prosecution Guidelines for each state. While some states have made minor amendments, there is not a substantive change in the Guidelines with regards to these public interest factors.

<sup>446</sup> Commonwealth Director of Public Prosecutions, above n 90 [3.1]-[3.11].

<sup>447</sup> Ibid [4.1].

<sup>448</sup> Ibid [4.2]-[4.6].

<sup>449</sup> Ibid [6.22]-[6.27].

<sup>450</sup> Ibid [6.1]-[6.10].

<sup>451</sup> Ibid [6.14]-[6.21].

<sup>452</sup> Ibid [2.19]-[2.23].

<sup>453</sup> Refshauge, above n 26, 359.

fairness in the exercise of the discretion.<sup>454</sup> As noted by McKechnie, a written prosecution policy is an ‘important keystone of independence’.<sup>455</sup> A set of guidelines enable a degree of objectivity to be brought to the decision-making process and independence is confirmed if the decision maker is able to justify a decision in accordance with previously published material.<sup>456</sup>

(a) *The Legal Effect*

While courts seem to encourage the development and promulgation of guidelines to assist in decision making,<sup>457</sup> the legal effect and enforceability of prosecutorial guidelines in Australia is not entirely clear as there has yet been any significant judicial decision by Australian courts on the matter.<sup>458</sup> They are not delegated legislation, merely ‘rules of law’,<sup>459</sup> and thus sit in an area of legal ambiguity.<sup>460</sup> There are however, certain general principles that can be drawn. Firstly, the guidelines must be lawful in the sense that they do not include considerations incompatible with their enabling statute,<sup>461</sup> or other legislation (such as, for example, racial discrimination legislation), or preclude the consideration of clearly relevant considerations.<sup>462</sup> Guidelines that fetter the decision maker’s discretion by leaving no room for the exercise of the discretion are legislative in nature and infringe upon the legal principle that administrative authorities should not legislate unless express authorization to do so is provided for.<sup>463</sup> The courts have held that the discretion must not be exercised in blind adherence to policy,<sup>464</sup>

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<sup>454</sup> Office of the United Nations High Commissioner for Human Rights, *Guidelines on the Role of Prosecutors* (1990) <<http://www2.ohchr.org/english/law/prosecutors.htm>>.

<sup>455</sup> McKechnie, above n 90.

<sup>456</sup> Ibid.

<sup>457</sup> *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 624 cited in Refshauge, above n 26, 364.

<sup>458</sup> Refshauge, above n 26, 364.

<sup>459</sup> *R v Immigration Appeal Tribunal; Ex parte Alexander* [1982] 1 WLR 1076, 1089; *De Falco v Crawley Borough Council* [1980] QB 460, 478-482.

<sup>460</sup> Refshauge, above n 26; See also Bibas, above n 13 on the difficulty of constraining prosecutorial discretion.

<sup>461</sup> *Green v Daniels* (1977) 51 ALJR 463, 467.

<sup>462</sup> *NCA Brisbane Pty Ltd v Simpson* (1986) 70 ALR 10, 47.

<sup>463</sup> *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492, 506.

<sup>464</sup> *R v Moore; Ex parte Australian Telephone and Phonogram Officers’ Association* (1982) 148 CLR 600, 613.



especially where the case in question requires individualized judgment,<sup>465</sup> as is the case with prosecutorial discretion.<sup>466</sup>

The non-compliance with prosecutorial guidelines may result in the decision being rendered null and void for failure to take into account relevant considerations.<sup>467</sup> This may however, be subject to privative clauses. For example, section 25(3) of the *Director of Public Prosecutions Acts 1990* (NT) states that the Director shall not be called into question on the ground of a failure to comply with published guidelines.<sup>468</sup> Additionally, the courts have shown a general reluctance to subject prosecutorial decisions to judicial review as was held in the case of *Maxwell v The Queen*.<sup>469</sup>

In the UK, however, in *R v Chief Constable of the Kent County Constabulary; Ex parte L (a minor)*,<sup>470</sup> it was held that the exercise of prosecutorial discretion not to prosecute was subject to judicial review, but only if the decision was made with no consideration of or contrary to the established guidelines.<sup>471</sup> Similarly, in *R v Inland Revenue Commissioner; Ex parte Mead*,<sup>472</sup> it was held that a member of the public had a legitimate expectation that the prosecution would follow its own published guidelines.<sup>473</sup> Additionally, in *R v Commissioner of Police of the Metropolis; Ex parte Blackburn*,<sup>474</sup> it was held that a policy decision not to prosecute certain gambling establishments were, in principle, reviewable if Wednesbury unreasonableness could be made out.<sup>475</sup>

As such, while the Australian courts have yet to indicate any definitive position on the legal effect of prosecutorial guidelines, it can at least be argued that they may be inclined to lean towards the English approach based on common law and

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<sup>465</sup> *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480, 493.

<sup>466</sup> Refshauge, above n 26, 364.

<sup>467</sup> *R v Immigration Appeal Tribunal; Ex parte Alexander* [1982] 1 WLR 1076, 1089, 148 CLR 600, 613.

<sup>468</sup> *Director of Public Prosecutions Act 1990* (NT) s 25(3).

<sup>469</sup> *Maxwell v The Queen* (1995) 184 CLR 501, 512, 535.

<sup>470</sup> [1993] 1 All ER 756

<sup>471</sup> *R v Chief Constable of the Kent County Constabulary; Ex parte L (a minor)* [1993] 1 All ER 756 cited in Refshauge, above n 26, 364.

<sup>472</sup> [1993] 1 All ER 772.

<sup>473</sup> *R v Inland Revenue Commissioner; Ex parte Mead* [1993] 1 All ER 772.

<sup>474</sup> [1968] 2 QB 118.

<sup>475</sup> *Ibid*; *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

principles of administrative law,<sup>476</sup> thus providing the aggrieved accused at least some basis for a challenge. In reality of course, this may be difficult to prove given the broad nature of the guidelines.

### (b) *The Practical Effect*

In Australia, prosecutorial guidelines are publicly accessible through the website of the various Directors of Public Prosecutions,<sup>477</sup> and in their annual reports.<sup>478</sup> Its

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<sup>476</sup> Refshauge, above n 26, 365.

<sup>477</sup> Commonwealth Director of Public Prosecutions, above n 90;

Office of the Director of Public Prosecutions (ACT), *Prosecution Policy and Guidelines of the Director of Public Prosecutions* (1991)

<[http://www.dpp.act.gov.au/about\\_the\\_dpp/the\\_prosecution\\_policy](http://www.dpp.act.gov.au/about_the_dpp/the_prosecution_policy)>;

Office of the Director of Public Prosecutions (NT), *Guidelines and Exercise of General Prosecutorial Discretion* (1991) <<http://www.nt.gov.au/justice/dpp/html/guidelines.html>>;

Office of the Director of Public Prosecutions (Qld), *Statement of Prosecution Policy and Guidelines* (1995) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)>; Director of Public Prosecutions (SA), *Prosecution Policy* (1999)

<[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)>;

Office of the Director of Public Prosecutions (Tas), *Director of Public Prosecution Guidelines* (1994) <[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)>;

Office of the Director of Public Prosecutions (Vic), *Prosecutorial Guidelines* (1993) <<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>>;

Office of the Director of Public Prosecutions (NSW), *Office of the Director of Public Prosecutions Guidelines* (2007)

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)>;

Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1999) <[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)>.

Notably, some jurisdictions (such as the UK) have gone one step further and made these policies available in a number of languages (Welsh, Arabic, Bengali, French, Gujarati, Polish, Punjabi, Somali, Tamil, Traditional Chinese, Urdu and of course, English) likely to facilitate further accessibility, particularly for racial minorities and individuals from a CALD (cultural and linguistically diverse) background: see The Crown Prosecution Service, *The Code for Crown Prosecutors* (February 2010).

<[http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/index.html](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html)>.

<sup>478</sup> Commonwealth Director of Public Prosecutions, *CDPP Annual Report 2010/2011* <<http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2010-2011.pdf>>;

Office of the Director of Public Prosecutions (ACT), *Annual Report 2010/2011* <[http://www.dpp.act.gov.au/files/annual\\_reports/AR2010-2011.pdf](http://www.dpp.act.gov.au/files/annual_reports/AR2010-2011.pdf)>;

Office of the Director of Public Prosecutions (NT), *Annual Report 2010/2011* <<http://www.nt.gov.au/justice/dpp/docs/Final%20Annual%20Report%2004.10.11.pdf>>;

Office of the Director of Public Prosecutions (Qld), *Annual Report 2010/2011* <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0017/130661/odpp-annual-report-2010-11.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0017/130661/odpp-annual-report-2010-11.pdf)>;

Office of the Director of Public Prosecutions (SA), *Annual Report 2010/2011* <<http://www.dpp.sa.gov.au/03/2010-11.pdf>>;

Office of the Director of Public Prosecutions (Tas), *Annual Report 2010/2011* <[http://www.crownlaw.tas.gov.au/\\_\\_data/assets/pdf\\_file/0005/180977/ar2010-11.pdf](http://www.crownlaw.tas.gov.au/__data/assets/pdf_file/0005/180977/ar2010-11.pdf)>;

Office of the Director of Public Prosecutions (Vic), *Annual Report 2010/2011* <[http://www.opp.vic.gov.au/Home/Resources/oppannualreport\\_2010-11-fullreport](http://www.opp.vic.gov.au/Home/Resources/oppannualreport_2010-11-fullreport)>;

accessibility facilitates plea negotiations between the prosecution and defence counsel (or the accused, if unrepresented).<sup>479</sup> Similarly, while it is arguable that the public availability of these documents allows for public scrutiny of the guidelines, offers some form of accountability of the prosecutors operating throughout the States and Territories,<sup>480</sup> and ensures that prosecutors act in accordance with these guidelines, this was not always the accepted position. In a Law Reform Commission Paper by Cashman and Rizzo, it was noted by a prosecuting officer that while prosecutorial guidelines were necessary for the guidance of persons who have to make decisions on prosecutions, no useful purpose could be served by publicly stating what those guidelines are.<sup>481</sup> It was further argued that positive harm might result from the public availability of the guidelines by allowing greater scope for delay and other tactics by the accused.<sup>482</sup> Sallmann also acknowledges that prosecutors may be reluctant to declare such guidelines in a public way as it would make their jobs more difficult.<sup>483</sup> The suggestion is that while prosecutorial guidelines may be useful, their internal circulation is sufficient and it is neither necessary nor appropriate to have them publicly promulgated. This warning was however not followed through and in 1982 the Commonwealth Attorney-General tabled a statement of the Commonwealth's Prosecution Policy in the Senate.<sup>484</sup> Today the guidelines of the respective Directors of Public Prosecution are easily accessible to anyone with internet access.<sup>485</sup> Its practical effect is to allow for a degree of public scrutiny and accountability of prosecutorial decisions. At the very least, it alerts the public to the very *existence* of prosecutorial discretion.<sup>486</sup>

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Office of the Director of Public Prosecutions (NSW), *Annual Report 2010/2011* <[http://www.odpp.nsw.gov.au/annual%20reports/2011%20AR%20\\_Final\\_lowres.pdf](http://www.odpp.nsw.gov.au/annual%20reports/2011%20AR%20_Final_lowres.pdf)>;

Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)>.

<sup>479</sup> Defence counsel may for example, cite certain portions of the Guidelines that would favour a reduced charge in the particular circumstances.

<sup>480</sup> Bugg, above n 66, 9; McKechnie, above n 90.

<sup>481</sup> Peter Cashman and Concetta Rizzo, *Social Security Prosecutions* (Australia Law Reform Commission Research Paper 9, 1982) 77.

<sup>482</sup> *Ibid.*

<sup>483</sup> Sallmann Willis, above n 54, 65, 83 (note 32).

<sup>484</sup> Cashman and Rizzo, above n 481.

<sup>485</sup> In the United States for example, it was noted that the internet has assisted in curing the defect of the inaccessibility of prosecutorial guidelines which may facilitate better control of prosecutorial discretion, see Simons, above n 21 (note 181).

<sup>486</sup> Sallmann and Willis, above n 54, 65.

In Singapore, *Ramalingam*<sup>487</sup> brought to light the very real and serious consequences of prosecutorial discretion, especially in a system with the mandatory death penalty. The case has increased public scrutiny of prosecutorial discretion and has raised a series of discussion points for the Singapore criminal justice system, one of which is whether there should be greater transparency of the prosecution service and ancillary to that, whether the public promulgation of prosecutorial guidelines and disclosure of reasons for prosecutorial decisions would serve to ensure consistency in the exercise of prosecutorial discretion so as to instill greater public confidence in the criminal justice system.

While internal guidelines exist to ensure consistency,<sup>488</sup> unlike the Australian model, these are not published in Singapore and the Attorney-General does not generally explain his prosecutorial decisions. However, it has been mentioned that the Attorney-General and his/her officers would 'consider a large number of often competing interests, including those of the victim, the accused person and society as a whole'.<sup>489</sup> Singapore's Attorney-General, Sundaresh Menon<sup>490</sup> has spoken out against the publication of prosecutorial guidelines stating that it would 'hamper [the] discretion rather than promoting anything in particular'.<sup>491</sup> There is also a risk that defendants might 'mount challenges against prosecutorial decisions, leading to a rise in satellite litigation, among other things'.<sup>492</sup> When queried on what 'public interest' considerations are and how they would factor in any prosecutorial decisions, the Attorney-General responded:

An integral part of every prosecutorial decision is consideration of the public interest. This is an easy formulation or label but it is very difficult to explain exactly what it means or how it plays out in practice. It is certainly never a matter of being populist. So I don't regard it as a legitimate part of the A-G's function to pick his prosecution priorities or shape his policies by his sense of what would be

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<sup>487</sup> *Ramalingam Ravinthran v Attorney-General* [2012] SLR 59. Facts of the case discussed above at page 57 of this paper.

<sup>488</sup> Vijavan, above n 145.

<sup>489</sup> Ibid.

<sup>490</sup> Sundaresh Menon has since been appointed as a Judge of Appeal on 6 August 2012 and will take up his new appointment as Chief Justice of Singapore in 6 November 2012.

<sup>491</sup> K C Vijavan, 'Plans for Laws to Support Plea Bargaining', *The Straits Times* (Singapore) 6 May 2011.

<sup>492</sup> Vijavan, above n 145.

popular to the public or a particular segment of it. The public interest connotes the fact that when a prosecutor makes a charging decision he or she is doing so in an expression of his or her assessment of what society's response to the crime that has been committed should be. This can be a very complex assessment. Among other things, you need to be aware of what is happening in society in order to form some of these views. There is no grid or formula that you apply in coming to a decision. *You fall back on the internal guidelines that have been devised to provide guidance for such decisions.*<sup>493</sup>

Thus, while the Attorney-General's Chambers ('AGC') has mentioned that internal guidelines are referred to,<sup>494</sup> the argument is that not publishing them would give more flexibility to depart from the guidelines where the 'interests of justice calls for this in any given case, while keeping to a broadly consistent path',<sup>495</sup> as the nature of prosecutorial discretion can 'rarely be dealt with in a mechanistic or mathematical way'.<sup>496</sup> Furthermore, with the inevitable resource constraints, the AGC has to prioritise the prosecution of offences and it takes into account enforcement priorities, among other things.<sup>497</sup> Publishing guidelines, it has been contended, may allow for potential offenders to identify prosecution priorities and areas where the prosecution would exercise restraint and this may result in offenders being more 'incentivized to commit such crimes expecting that they would probably not face the full force of the law'.<sup>498</sup>

K Shanmugam, the Singapore Minister for Law, has also come out in support of non-disclosure. In response to an opposition Member of Parliament's query on the issue, the Minister acknowledged the safeguards that public disclosure can facilitate but highlighted the trade-offs that would come, inevitably, as a result:

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<sup>493</sup> K C Vijavan, 'Q & A: Public Interest at the heart of prosecutorial decisions, *The Straits Times* (Singapore) 29 October 2011.

<sup>494</sup> *Ibid.*

<sup>495</sup> Attorney-General's Chambers, *The Exercise of Prosecutorial Discretion* (Press Release, 29 January 2012) [8].

<sup>496</sup> Vijavan, above n 145.

<sup>497</sup> K C Vijavan, 'AG has full discretion to prosecute: Minister', *The Straits Times* (Singapore) 14 October 2011.

<sup>498</sup> Grace Leong, 'AGC addresses issues raised over discretionary powers: It explains why prosecution guidelines can't be made public', *The Business Times* (Singapore) 21 January 2012.

[S]hould we change the system? I think really we need to start with a context here – what is the kind of criminal justice system that we want. We want a system where the guilty are convicted, the innocent are acquitted and the wider interests of society are protected, which includes the protection of society from those who could cause it harm. If it is clear that public disclosure by the Attorney-General, of his reasons why differential treatment is being given, will improve the criminal justice system, then it is a no-brainer; we must make sure that the law requires such disclosure.

So the question is, is that clear? The reality is that the position is not so clear. There are trade-offs, as Members know. What are the trade-offs here? If reasons underlying prosecutorial decisions are revealed, it can compromise intelligence and other confidential sources that inform such decisions, which, as I said earlier, the Court of Appeal recognised. *And, let us not kid ourselves, you will have some criminals who will try and work around the guidelines and game the system.* That is in the nature of, not everyone, but there will be some people who will do that. In the United Kingdom, as I am sure Mr Singh is aware, there was a case where a person applied to court, for the Director of Public Prosecutions (DPP) to disclose in advance, the guidelines that would inform the DPP's decision whether an offence which was going to be committed, would be prosecuted. So, I am going to do this, you tell me in advance – because you have published the guidelines – whether I will be prosecuted or not.<sup>499</sup>

These comments echo the concern about the possibility of an abuse of the system by the accused. The Minister's caution that 'you will have some criminals who will try and work around the guidelines and game the system',<sup>500</sup> is in many ways, reminiscent of the warning sounded in Australia by the Cashman and Rizzo Law Reform Commission Paper,<sup>501</sup> that the public availability of prosecutorial guidelines not only served no useful purpose, but may provide a larger scope for accused persons to use to their advantage through delaying tactics which would subsequently result in justice not being served and undermine public confidence in the criminal justice system.

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<sup>499</sup> Singapore, *Parliamentary Debates*, 6 March 2012, vol 88 (K Shanmugam, Minister for Law) (emphasis added).

<sup>500</sup> *Ibid.*

<sup>501</sup> Cashman and Rizzo, above n 481.

It would appear then, that there are two competing interests in this debate. The first, a necessary check to ensure the prosecutor exercises his discretion in good faith, consistently and correctly. The second, the need to ensure the efficient and speedy administration of justice - that there is less scope that accused persons could take advantage of to use for tactical reasons to escape justice.

The earlier caution noted in Cashmen and Rizzo's Law Reform Commission Report has been supported somewhat by the comments of at least one DPP noting that 'not all decisions...can be readily explained to the public',<sup>502</sup> citing the risk of compromising witness credibility or evidence.<sup>503</sup> Despite this, the preferred approach in Australia, as demonstrated by the significant steps taken to establish the respective Offices of the Director of Public Prosecutions and the public availability of uniform guidelines is apparent. Such is the price that Australia was willing to pay to ensure a more publicly accountable system.<sup>504</sup> In Singapore, efficient and speedy administration of justice takes priority, and as such, a system of internal guidelines and processes is not only sufficient, but appropriate. Here, the 'unspoken value judgment' of the Singapore legal and cultural system is evident.<sup>505</sup> It is the reverse of the aphorism that it is better to let 10 guilty persons go free than to convict one innocent one.<sup>506</sup> Upon weighing the risk that the prosecution acts wrongly or maliciously against the risk of the 'compromise of intelligence and all other attendant risks if disclosure is made',<sup>507</sup> the former, as the Minister for Law states, is the lesser of the two risks.<sup>508</sup>

With this model however, Singapore deprives itself of the practical and legal benefits publicly available prosecutorial guidelines offers. The system of internal guidelines and processes, even if adequate, relies on a high level of trust in the Attorney-General and the various prosecutors under his/her charge. There is little transparency and public scrutiny of the matter, and where these suffer, arguably, so too does public confidence in the system. Additionally, while Australia's

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<sup>502</sup> Bugg, above n 109.

<sup>503</sup> Ibid.

<sup>504</sup> Sallmann and Willis, above n 54, 83 (note 32).

<sup>505</sup> Hor, above n 265, 27.

<sup>506</sup> Ibid.

<sup>507</sup> Singapore, *Parliamentary Debates*, 6 March 2011, vol 88 (K Shanmugam, Minister for Law).

<sup>508</sup> Ibid.

judicial position on its own prosecutorial guidelines is less than clear, as argued, the public availability of the guidelines not only offers some level of transparency, but also may allow for a greater scope for an aggrieved accused to challenge a prosecutorial decision. The Singapore system does not allow for this, but as has been made clear, this is apparently the desired effect.

## VI THE TWO MODELS EXAMINED: PRAGMATISM VS PRINCIPLE

Australia's preference for transparency and accountability in their system of prosecution is apparent. As discussed, Singapore has taken a markedly different approach. In order to better understand this Singaporean approach to prosecution, it may be useful to examine the 'unspoken value judgment' of Singapore. Singapore is blessed, or some might say cursed, with an overwhelming commitment to pragmatism.<sup>509</sup> This pragmatic approach is evinced in government and policy, but arguably more so in areas of the criminal law and its administration.<sup>510</sup> Some contend that this could be due to 'Asian values',<sup>511</sup> that places the priorities of an ordered society over the needs of individual rights.<sup>512</sup> Hor goes on to make the point that moral discourse in Singapore does not feature prominently in official decision making in the context of criminal justice.<sup>513</sup> Rather, a rigid cost-benefit analysis is applied and if the cost of effective criminal deterrence necessitates the accidental punishment of innocent persons, then so be it.<sup>514</sup> Human rights advocates are quick to criticize this, but the Singapore model is perhaps not so much a system of deliberate government repression (or oppression), but merely a 'stark utilitarian calculus'.<sup>515</sup>

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<sup>509</sup> Hor above n 4, 512-3.

<sup>510</sup> For another example of this pragmatic approach, see Michael Hor, 'Illegal Immigration: Principle and Pragmatism in the Criminal Law' (2002) 14 *Singapore Academy of Law Journal* 18.

<sup>511</sup> This is of course, an oversimplification of the term. Indeed, it should be noted that given Asia's geographical and demographical diversity, it may be inappropriate to come to any conclusions on a particular 'Asian value', but a full discussion on the issue lies outside the confines of this paper. See for example, Donald K Emmerson, 'Singapore and the Asian Values Debate' in Lane Crothers and Charles Lockhart (eds) *Culture and Politics: A Reader* (Palgrave Macmillan, 2000) 119.

<sup>512</sup> There is also a historical basis for Singapore's developed approach to the criminal law, see Chan Sek Keong, above n 301, 3-5.

<sup>513</sup> Hor, above n 265, 28.

<sup>514</sup> Ibid.

<sup>515</sup> Ibid.



## *A The Two Models of Criminal Processes*

One can examine the criminal justice system against the two models illustrated by Professor Parker.<sup>516</sup> In his article, Parker refers to these as the ‘Crime Control model’ and the ‘Due Process model’.<sup>517</sup> These models serve to provide a normative guide as to what values might affect the criminal law and its administration.<sup>518</sup>

### *1 The Due Process Model*

Parker describes the Due Process model as an ‘obstacle course’.<sup>519</sup> It is designed at each level to provide formidable impediments to carrying the accused any further along its process in the hopes that no innocent accused is wrongly taken down the path. This has led some critics to claim it denies the social desirability of repressing crime, though this is not the case.<sup>520</sup> However, the Due Process model does reject the heavy reliance on the abilities of investigative and prosecutorial authorities in favour an informal, non-adjudicative fact-finding process that stresses the possibility of human fallibility, acknowledging that players in the administration of the criminal law can and do make mistakes and powers given to public officials can be abused.<sup>521</sup>

Its ideology gives primacy to the rights of the individual against those of the community or the state.<sup>522</sup> Under this model, civil liberties are accorded the highest priority and the underlying goal of the system can be summed up with the proposition that it is better to let ten guilty men go free than convict an innocent defendant.<sup>523</sup>

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<sup>516</sup> Parker, above n 1.

<sup>517</sup> Ibid; Also noted in Chan Sek Keong, ‘The Criminal Process – The Singapore Model’ (1996) 17 *Singapore Law Review* 433.

<sup>518</sup> Kent Roach, Four Models of the Criminal Process, (1999) 89 *The Journal of Criminal Law and Criminology* 671, 672.

<sup>519</sup> Parker, above n 1.13.

<sup>520</sup> Ibid 14.

<sup>521</sup> Parker, above n 1.

<sup>522</sup> This is of course stated at the risk of oversimplifying Parker’s theory. See Parker, above n 1.

<sup>523</sup> David Rose, *The Collapse of Criminal Justice* (Vintage, 1966).

## *2 The Crime Control Model*

If the Due Process model is an obstacle course, the Crime Control model is an assembly line.<sup>524</sup> It is based on the proposition that the repression of criminal conduct is the most important function to be performed by the criminal process.<sup>525</sup> The failure to bring criminal conduct under tight control is viewed as leading to the breakdown of public order, leading to the victimization of law-abiding citizens by law-breakers.<sup>526</sup> Thus, with the ‘credo of justice with efficiency’,<sup>527</sup> the Crime Control model demands a high rate of apprehension and calls for a swift and successful convictions not by through the adjudication of the courts, but with a guilty plea.<sup>528</sup> There must be speed and finality in the conclusion of these matters and this may necessitate minimizing the occasion for challenge and removing the clutter of ceremonious rituals or obstacles that do not advance the progress of a case.

This in turn, places a high degree of trust in the efficiency of the criminal processes, and the officials administering that process. Police and prosecutors act as early determinators of probable guilt or innocence.<sup>529</sup> The probably innocent are screened out and the probably guilty quickly passed to the remaining stages of the process.<sup>530</sup> Once this determination is made and sufficient evidence of guilt found so that an accused should be held for further action, they are treated as probably guilty even before final adjudication by the court.<sup>531</sup> It is assumed that this early determination of guilt made by reliable officials then allows for the remaining stages of the criminal process to be merely perfunctory, facilitating efficiency.

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<sup>524</sup> Parker, above n 1.13.

<sup>525</sup> Ibid.

<sup>526</sup> Ibid.

<sup>527</sup> Chan Sek Keong, above n 517, 441.

<sup>528</sup> Parker, above n 1.

<sup>529</sup> Ibid.

<sup>530</sup> Ibid.

<sup>531</sup> Ibid.

## *B The Models in Relation to Prosecutorial Discretion*

### *1 Australia*

In some ways, Australia's significant efforts at ensuring safeguards, checks and balances in the exercise of prosecutorial discretion by way of the establishment of the independent office of the DPP, and the public promulgation of guidelines to afford better transparency evinces elements of the Due Process model. Australia acknowledges the fallibility of its public officers charged with the administration of justice and thus makes an attempt to ensure the protection of civil liberties. These efforts however, would hardly be appreciated by the Crime Control model which would likely deem these as obstacles and ceremonious rituals that merely give greater scope for challenges resulting in an inefficient and undesirable criminal justice system.

### *2 Singapore*

Singapore on the other hand, demonstrates a number of traits one might find in the Crime Control model, as suggested by then Attorney-General Chan Sek Keong,<sup>532</sup> particularly if one uses the following three factors as indicators: (1) the high percentage of cases disposed of through guilty pleas, (2) the insignificant number of cases where miscarriages of justice have been raised in public; and finally (3) Singapore's low crime rate. Singapore's model relies on internal procedures and safeguards which in turn depend on a high level of trust in the Public Prosecutor and his Deputies to ensure prosecutorial discretion is exercised consistently and fairly. It can be contended that its high conviction rates is demonstrative of the success of the Crime Control model – an early determination of the probably guilty have already been made, rendering the remaining processes perfunctory. As such, the adoption of pragmatism with a stark utilitarian calculus is perhaps a conscious attempt by Singapore to ensure the criminal process

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<sup>532</sup> Chan Sek Keong was appointed the Chief Justice of Singapore in 2006, and will be stepping down on 6 November 2012 in favour of Sundaresh Menon (now Judge of Appeal and former Attorney-General).

performs as it was meant to, ensuring the elimination, or at least severe reduction in criminal conduct.

### *C Efficacy*

While it would not be proper for a prosecution service to push for a conviction at all costs, it has generally been accepted that conviction rates may be used as one measure of a prosecution service's effectiveness.<sup>533</sup> Conviction rates may thus be used to compare the effectiveness of the prosecution services in Australia and Singapore.<sup>534</sup> Western Australia's percentage of conviction after trial is approximately 61%,<sup>535</sup> and Singapore's rate is 92% for Subordinate Court matters and approximately 82% for High Court matters.<sup>536</sup> This discrepancy is a significant one and considering the different models of criminal processes adopted by the two countries, it is perhaps unsurprising. Sufficed to say then, based on this, if the aim of a criminal justice system is to secure a high conviction rate, then the pragmatic approach preferred by Singapore and illustrated by the Crime Control model, with greater prosecutorial discretion will facilitate this objective.

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<sup>533</sup> In WA, the DPP uses the percentage of conviction after trial as a Key Performance Indicator. In 2010/2011, this was 50%, see Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 52.

<sup>534</sup> The author acknowledges that a myriad of interwoven and often complicated factors affect conviction rates and to use it as the sole indicator of the success of a criminal justice system would be flawed. Nonetheless, it does offer some useful insight into the efficiency of the prosecution services.

<sup>535</sup> This includes the matters handled by the DPP which have a conviction rate of 60.6% in 2010/2011 and the matters handled by the police prosecutors which have a conviction rate of 62.2% in 2010/2011, see Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 52 and Western Australia Police, *Annual Report 2011* <<http://www.think-creative.com.au/CLIENTS/WAPolice2011PrintFriendly.pdf>> 15, respectively.

<sup>536</sup> The figure for the Subordinate Courts was mentioned by then Attorney-General Chan Sek Keong in Chan Sek Keong, above n 296, 34 (note 20) as 92% for 1998 and 1999. The 82% figure for the High Court was obtained by subtracting the percentage acquitted from the number serious offences before the High Court in 1996, see Tseng, above n 59, 118. While it would be ideal to compare more recent statistics, Singapore does not make conviction statistics publicly available.

## VII A CHANGING TIDE IN RECENT TIMES?

Pragmatism is one thing, political palatability quite another. As one author aptly puts it:

[w]ith the seemingly unstoppable march of so-called international human rights developments in most places in the world, and the ever-increasing public appetite for political accountability and transparency here and elsewhere, there may come a time when the state (more specifically, the Attorney-General) has to confront the question as to whether it has to or should recalibrate the balance it has struck between its (extremely challenging) task of prosecuting crime and its commitment to protecting the right to presumption of innocence<sup>537</sup>

As calls for political accountability grows, it may not be a stretch of the imagination to see Singapore's gradual shift from its pragmatic approach towards at least some elements of the Due Process model. While Singapore's dominant People's Action Party has been returned overwhelmingly to government in every election since the founding of the nation-state, dissatisfaction with its 'pragmatic' and 'stark utilitarian' approaches is gradually but readily discernable. Its once unimpeachable popular mandate has been eroded most notably in the most recent General Election, where an opposition party was for the first time able to secure a Group Representative Constituency,<sup>538</sup> sending five of its members into Parliament.<sup>539</sup> This is perhaps insignificant in most Western liberal democracies, but in Singapore, where the People's Action Party has enjoyed virtually unchallenged popularity and is often synonymous with the State itself, this may be an indicator of discontent with the system. In light of this, a number of political issues, including prosecutorial discretion have been cast into the limelight and subject to public scrutiny. There is arguably a public concern that Singapore has

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<sup>537</sup> Chen Siyuan, 'Prosecutorial Discretion Revisited' [2012] (April) *Singapore Law Watch Commentary* 1, 4.

<sup>538</sup> For an outline of the Singapore parliamentary system see Kevin Tan, 'Parliament and the Making of Law in Singapore' in Kevin YL Tan (ed) *The Singapore Legal System* (Singapore University Press, 2<sup>nd</sup> ed, 1999) 123, 144. See also Singapore, *Parliamentary Debates*, 11 January 1988, vol 50, col 183 (Goh Chok Tong, Deputy Prime Minister) for the Second Reading Speech of the Parliamentary Elections (Amendment) Bill that introduced the Group Representative Constituency system in Singapore.

<sup>539</sup> Channel News Asia, *General Election 2011* (2011) <[www.ge.sg/tally](http://www.ge.sg/tally)>.

not attained a ‘minimum level’ – a level of transparency and accountability in the exercise of prosecutorial discretion that society finds acceptable. The failure to find this ‘minimum level’ may then lead to a loss of public confidence in the criminal justice system. This has resulted in number of brave new changes in the criminal law landscape which seems contrary to the Crime Control model. These changes appear to be attempts to reduce the prosecutor’s discretion, or at least make the process more transparent, recalibrating the fine balancing act required in prosecutorial discretion.

### *A Amendments to the Disclosure Regime*

Until recently, the criminal disclosure process in Singapore was as some would claim, stacked against the accused and has been the subject of considerable criticisms by academics and the criminal bar.<sup>540</sup> For example, the prosecution was entitled to interrogate and obtain statements from the accused without having his lawyer or any other third party present. The prosecution was also not required to disclose any prosecution witness statements.<sup>541</sup> The criminal discovery process was informal<sup>542</sup> and requests for information helpful to the defence were rarely acceded to.<sup>543</sup> In both *Tay Koh Poh Ronnie*<sup>544</sup> and *Selvarajan James*,<sup>545</sup> the Court found a minimal duty of disclosure on the prosecution. This posed considerable obstacles for the accused and his counsel. Defence counsel often received an unpleasant surprise when proceeding upon the basis that the accused has made no incriminating statements only to learn later that their clients have made an earlier confession to the police. As Winslow contends, this not only undermines

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<sup>540</sup> K S Rajah, ‘Discovery and Fair Trials’ [2003] (November) *Law Gazette* 1; Amarjeet Singh, ‘Equality of Arms - The Need for Prosecutorial Discovery’ [2005] (September) *Law Gazette* 3; Singapore, *Parliamentary Debates*, 2 March 2007, vol 82, col 2338 (Sylvia Lim); Winslow, above n 327; Wong Siew Ming Audrey, ‘Criminal Justice for All? Wrongful Convictions and Poverty in Singapore’ (2010) 28 *Singapore Law Review* 67.

<sup>541</sup> Winslow, above n 327.

<sup>542</sup> Lim Wee Teck, ‘The Phantom of Pre-Trial Discovery by the Accused: The Singapore Experience’ [1982] *Law Times* 19.

<sup>543</sup> Winslow, above n 327.

<sup>544</sup> *Tay Koh Poh Ronnie v Public Prosecutor* [1995] 3 SLR(R) 545.

<sup>545</sup> *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946. In *Selvarajan James*, while it was noted that a more onerous disclosure regime would result in a fairer trial, the Court was of the opinion that this was for Parliament, not the Courts, to impose.

counsel's preparation of the defence but does no credit to the administration of justice in the State.<sup>546</sup>

Taking effect in 2 January 2011, the amendments in the *Criminal Procedure Code* have since gone some ways in redressing the balance between the state and the defence.<sup>547</sup> Notable changes have included an attempt to formalize the disclosure framework by way of Part IX of the Act, which requires the prosecution to furnish all statements made by the accused at any time, even where such statements would only be useful to the defence.<sup>548</sup> Where the prosecution fails to comply with the discovery obligations, the Court may order a discharge not amounting to an acquittal in relation to the charge.<sup>549</sup> However, under both the old and revised Criminal Procedure Codes, there is obligation on the prosecution to disclose any kind of *unused* material.<sup>550</sup> This changed with the case of *Kadar*, where the Court of Appeal analyzed the disclosure obligations in a range of jurisdictions, including Kirby J's judgment in *Mallard*,<sup>551</sup> and imported a more onerous common law duty of disclosure on the prosecution.<sup>552</sup> These changes are significant in leveling the playing field.

### B *Public Prosecutor v Wu Tze Liang Woffles*

An example illustrating this gradual movement is the case of Woffles Wu. Prominent surgeon Dr Woffles Wu was charged and fined \$1000 under section 81(3) of the *Road Traffic Act*<sup>553</sup> for abetting an elderly employee in providing misleading information to the police for a speeding offence involving his car in November 2006. He was given a stern warning for a similar offence on 11 September 2005.<sup>554</sup> There was public outrage at the perceived leniency of the sentence and some observers noted that Wu was charged under section 81(3) of

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<sup>546</sup> Ibid.

<sup>547</sup> Chan Sek Keong, 'Opening of the Legal Year 2011: Response by the Honorable Chief Justice' (Speech delivered at the Opening of the Legal Year 2011, Singapore, 7 January 2011) [5].

<sup>548</sup> Singapore, *Parliamentary Debates*, 18 May 2010, vol 87 (Sylvia Lim).

<sup>549</sup> *Criminal Procedure Code* (Singapore, cap 68, 2012 rev ed) s 169.

<sup>550</sup> *Muhammad bin Kadar v Public Prosecutor* [2011] SGCA 32 [80] (emphasis in original).

<sup>551</sup> Ibid [87]; *R v Mallard* (2005) 224 CLR 125.

<sup>552</sup> Ibid [2011] SGCA 32 [103].

<sup>553</sup> *Road Traffic Act* (Singapore, cap 276 rev ed 2004) s 81(3).

<sup>554</sup> *Public Prosecutor v Wu Tze Liang Woffles* (Unreported, Subordinate Courts of Singapore, 12 June 2012).

the *Road Traffic Act*<sup>555</sup> where it is typical for a fine or at most a short custodial sentence to be imposed,<sup>556</sup> when he could have been charged for the more serious offence of perverting the course of justice under section 204A of the *Penal Code*,<sup>557</sup> a far more serious offence with a term of imprisonment of up to 7 years. He could also have been charged with providing false information with the intent to cause a public servant to use his lawful power to the injury of another under section 182 of the *Penal Code*.<sup>558</sup> Under the doctrine of prosecutorial discretion, prosecutors need not to provide reasons for preferring a particular charge and typically do not.<sup>559</sup>

There was however continued public discontent with the outcome of the case with allegations that lesser charges were preferred due to Wu's affluence and social position. In light of this, the AGC broke prosecutorial silence and in a formal statement, issued reasons for its decision to proceed with the lesser charge.<sup>560</sup> The AGC stated that a section 204A charge under the *Penal Code* was inappropriate as the offence was committed in 2006, and section 204A was only enacted in 2008. The statement also mentioned that the charge preferred against accused persons would be calibrated to reflect the seriousness of the criminal act and the fact situation, and based on this it was considered more appropriate to proceed with section 81(3) of the *Road Traffic Act* than invoke general provisions of the *Penal Code*.<sup>561</sup>

The case is significant for several reasons. Firstly, it evinces a growing public awareness of the exercise of prosecutorial discretion in the selection of charges and the public dissatisfaction of the secrecy that surrounds the process. Secondly, the AGC's rare move to provide reasons for the charge in light of the public

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<sup>555</sup> *Road Traffic Act* (Singapore, cap 276 rev ed 2004) s 81(3).

<sup>556</sup> Attorney-General Chambers, 'PP v Wu Tze Liang Woffles' (Press Release, 17 June 2012) [3].

<sup>557</sup> *Penal Code* (Singapore, cap 224, rev ed 2008) s 204A.

<sup>558</sup> *Ibid* s 182.

<sup>559</sup> As was reiterated in *Ramalingam Ravinthran v Attorney-General* [2012] SLR 59, 79 [74], citing the English position at common law, see *Regina v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531, 564E Cf judicial duty to give reasons in *Thong Ah Fat v Public Prosecutor* [2012] SLR 676.

<sup>560</sup> Attorney-General Chambers, above n 548; Tessa Wong, 'AGC Clarifies Reasons for Charges', *The Straits Times* (Singapore) 18 June 2012.

<sup>561</sup> Attorney-General Chambers, above n 548 [5].



outcry demonstrates an understanding that some transparency in the prosecutor's decision making process is essential if public confidence in the system is to be maintained. Indeed, the formal issuing of reasons for preferring a particular charge is a whole new level of transparency that would not ordinarily be seen even in Australia. While it would be foolish to expect prosecutorial reasons for every criminal charge, this could entail for greater transparency in controversial cases and lay the groundwork for further reform in the area.

### *C Plea Bargaining Reform*

The plea bargaining process is also prevalent in Singapore which encompasses a similar process of informal negotiations between the accused and prosecutors.<sup>562</sup> This gives rise to the same set of problems discussed above, not least of all the lack of transparency of the prosecutor's discretion in the process. At the opening of the Legal Year in 2011,<sup>563</sup> the Chief Justice noted the issue and the Attorney-General has announced that a revised, more formal framework to plea bargaining is currently being considered.<sup>564</sup> This would institutionalize the structure of plea bargaining so that it is done not just through informal discussions between prosecutor and accused.<sup>565</sup>

The changes include a Senior District Judge who will sit in as a neutral mediator with Prosecution and Defence Counsel to facilitate discussions on the merits of the case,<sup>566</sup> the charges and sentences that may be imposed. This process, referred to as 'Criminal Case Resolution',<sup>567</sup> helps parties consider all available options on the table. The accused can then elect to do one of three things (1) plead guilty to the original charge, (2) plead guilty to an amended charge, or (3) claim trial. Similarly, the prosecutor may choose to drop charges or proceed with amended ones.

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<sup>562</sup> Tseng, above n 59, 109.

<sup>563</sup> Chan Sek Keong, 'Opening of the Legal Year 2011: Response by the Honorable Chief Justice' (Speech delivered at the Opening of the Legal Year 2011, Singapore, 7 January 2011) [6]; Chan Sek Keong, 'Opening of the Legal Year 2012: Response by the Honorable Chief Justice' (Speech delivered at the Opening of the Legal Year 2012, Singapore, 6 January 2012) [12]; Sundaresh Menon, 'Opening of the Legal Year 2011: Speech by the Attorney-General' (Speech delivered at the Opening of the Legal Year 2012, Singapore, 6 January 2012) [5].

<sup>564</sup> K C Vijayan, 'Plans for laws to support plea bargaining', *The Straits Times* (Singapore) 6 May 2011.

<sup>565</sup> Ibid.

<sup>566</sup> Kessler Soh, 'Criminal Case Resolution in the Subordinate Courts of Singapore' (Paper presented at the Australasian Institute of Judicial Administration Conference on Criminal Justice in Australia and New Zealand: Issues and Challenges for Judicial Administration, Sydney, 7-9 September 2011); Chan Sek Keong, 'Advancing Justice through Innovation' (Paper presented at the Subordinate Courts Workplan 2012, Singapore, 9 March 2012) [3]. Subordinate Courts of Singapore, *Registrar's Circular No 4 of 2011: Criminal Case Resolution* (2011). The Subordinate Courts of Singapore officially implemented the Criminal Case Resolution process on 10 October 2011.

<sup>567</sup> The Criminal Case Resolution seems to thus far be limited to accused represented by counsel, however given that it is still early days into its inception, this may well be eventually extended to included unrepresented defendants. See Soh, above n 561; Subordinate Courts of Singapore, *Registrar's Circular No 4 of 2011: Criminal Case Resolution* (2011); Law Society of Singapore, *Plea Bargaining in Singapore: Defence's Perspective* (4 May 2011).

The 3-way Criminal Case Resolution provides for greater certainty and transparency. The parties are in fact negotiating a guilty plea in return for an agreed sentence, whereas under the 2-way process, it may sometimes be difficult for defence counsel to explain to the accused the outcome of their case. The presence of a senior judicial officer also acts as an additional check on the process and would also likely instill greater public confidence in the plea bargaining process. While it is still early days in the plea bargaining reform, it does signify a shift to ensure greater visibility and transparency in the otherwise relatively secretive process.

#### *D Giving Discretion back to the Courts: Tweaking the Mandatory Death Penalty*

Until recently, the mandatory death penalty in Singapore was unapologetically extended to a number of offences, most notably homicide and drug related ones. For example, section 300 of the *Penal Code* provides that culpable homicide amounts to murder where:<sup>568</sup>

- (a) The act by which death is caused is done with the intention of causing death;
- (b) The act is done with the intention of causing such bodily injury as the offender knows is likely to cause death;
- (c) The act is done with intention of causing bodily injury, and such bodily injury is sufficient in the ordinary course of nature to cause death; and
- (d) The act is done with the knowledge that it is so imminently dangerous that it must in all probability cause death, and without any excuse for incurring the risk of death.

If any of these charges are proven beyond reasonable doubt, then section 302 provides for the mandatory imposition of the death penalty.<sup>569</sup> On 9 July 2012, in an unprecedented move, the Singapore Government announced that while the

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<sup>568</sup> *Penal Code* (Singapore, cap 224, rev ed 2008) s 300.

<sup>569</sup> *Ibid* s 302.

death penalty would still be retained for all provisions, only section 300(a) would attract the mandatory death penalty.<sup>570</sup>

Similarly, section 17 of the *Misuse of Drugs Act*<sup>571</sup> was as some would say ‘draconian’<sup>572</sup> and does not make a distinction between drug lords and mules, thus leading to what some would perceive as a gross injustice as was in the recent case of Yong Vui Kong.<sup>573</sup> In that case, the mandatory death penalty was imposed upon ‘impoverished and vulnerable’<sup>574</sup> 19 year old Yong Vui Kong, little more than a naïve drug mule, and thus supposedly less morally blameworthy. The recent amendments now allow for mandatory death penalty to be tempered somewhat if certain conditions are met. For example, where the offender’s cooperation with authorities assists in convictions of those further up the drug supply chain, the discretionary and not the mandatory death penalty applies.<sup>575</sup> Additionally, if a mental disability affects the offender’s ability to understand the gravity of the offence, the courts now have the discretion to take this into consideration.<sup>576</sup>

For a country that has been unapologetic in its authoritative approach, this move is significant and it will be interesting to witness the effect of these proposed amendments upon the criminal law landscape in Singapore. In the context of homicide offences, while section 300(a) still attracts the mandatory death penalty, the reality is that the majority of charges placed by the prosecution against the accused revolves around section 300(c),<sup>577</sup> causing death with the intention of

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<sup>570</sup> Singapore, *Parliamentary Debates*, 9 July 2012, vol 89, col 38 (K Shanmugam, Minister for Law).

<sup>571</sup> *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008) s 17 is a presumption clause that reverses the burden of proof – any person with more than a certain amount of drugs in his possession is presumed to have had that drug in possession for the purposes of trafficking, unless the contrary is proven.

<sup>572</sup> As described by Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 AC 648, 666.

<sup>573</sup> *Yong Vui Kong v AG* [2011] 1 SLR 1.

<sup>574</sup> Afua Hirsch, ‘Heroin smuggler challenges Singapore death sentence’, *The Guardian* (London) 15 March 2010.

<sup>575</sup> Singapore, *Parliamentary Debates*, 9 July 2012, vol 89, col 33 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

‘Singapore scraps mandatory death penalty for drug couriers: Judges will have discretion to impose life sentences in some cases’, *The Guardian* (London) 9 July 2012.

<sup>576</sup> Singapore, *Parliamentary Debates*, 9 July 2012, vol 89, col 33 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

<sup>577</sup> Hor, above n 301, 107.

causing bodily injury that is sufficient in the ordinary course of nature to cause death. This thus potentially shifts the sentencing discretion of the bulk of potential homicide cases back into the hands of the judiciary. The death penalty itself of course is not abolished, and still remains a viable sentence, but it is no longer mandatory and the court will have to exercise their discretion when imposing a sentence, taking into account each case's individual facts and circumstances. The prosecution may still if it so choose elect for a section 300(a) charge, though it is of course far more onerous to establish an intention to cause death, than merely an intention to cause bodily harm sufficient in the ordinary course of nature to cause death.

The decision on which charge to bring still lies with the Attorney-General. A charge under section 300(a) continues to attract the mandatory death penalty if the courts find a guilty verdict. This still vests enormous power in the office of the Attorney-General, but a charge under any of the other 'lesser' provisions, section 300 (b), (c), or (d) will allow the court to exercise its discretion, to impose (or not) the death penalty, taking into account each case's individual facts and circumstances.

The aforementioned landmarks in the legal landscape of the criminal law in Singapore could signify government awareness of the growing public dissatisfaction with the secrecy and lack of transparency surrounding the exercise of prosecutorial discretion. The new measures could be some attempts to balance the system – to on the one hand continue to have sufficient discretion so as to allow for efficient prosecution of criminal offences, but tempered with the need to be more transparent and publicly accountable. These steps could also be Singapore trying to find and establish its 'minimum level' of acceptable transparency and accountability in prosecutorial discretion.

## VIII WHICH WAY FORWARD?: FINAL WORDS

Prosecutorial discretion is an inevitable part of the criminal justice system and will not disappear any time soon. The question then is to what extent should the discretion be scrutinized and/or restrained so as to balance the competing interests of efficiency on the one hand and transparency, independence and fairness on the other. Both play integral roles in the administration of justice. The collapse of either would result in a decline of public confidence in the criminal process.

If the objective of a prosecution service is to be transparent, independent and fair, then Australia has taken significant steps to ensure that the Public Prosecutor and the discretion that the Office exercises is such and seen to be such. Is it however a perfect system? Arguably not, as the South Australian example of *Nemer* has demonstrated. The retention of police prosecutors is also illustrative of the resource constraints faced by the system. As suggested above, measures to restrain the exercise of prosecutorial discretion and processes to ensure its transparency that advocates of civil liberties would hail may come at the cost of efficiency. Given the ever increasing caseloads that courts are inevitably facing and the reality of the criminal justice system, an overzealous approach to these measures, while admirable, is perhaps unwise. As one commentator has put it:

[F]or too long those involved in the criminal justice system have been wedded to the idea that justice is such a sacrosanct commodity that it virtually has no price. One result of this attitude has been, until recently, little demonstration about the economics of the criminal trial system...unless new rules are devised which will make our criminal justice system more efficient, but no less just, I fear there will soon be a time when we will be unable to prosecute certain cases that should be prosecuted for the only reason that it would be simply too costly to do so.<sup>578</sup>

Singapore and Australia certainly have some similarities – the reluctance of the judiciary to intervene in the exercise of prosecutorial discretion for example, which affirms the traditional notion of the separation of powers. However, while

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<sup>578</sup> Victorian Shorter Trials Committee, *Report on Criminal Trials* (Australia Institute of Judicial Administration, 1985) [1.53] cited in Rozenes, above n 39, 12.

Australia's model still vests considerable power within its prosecution service, the system is marked by a number of attempts to restrain and make the process more transparent and independent. These measures, indicative of the Due Process model, are a result of historical developments that have thus far fulfilled their objectives of fairness, accountability, independence and transparency. The tradeoff in efficiency, which some initially questioned, has been generally accepted as necessary.

What then does the future hold for prosecutorial discretion in Singapore and Australia? Australia appears to be satisfied with its approach thus far, albeit with some minor continual adjustments that we may see further down the road, such as for example additional transfer of prosecutorial functions from the police to the DPP, if resources permit. Nonetheless, Australia has found and established its 'minimum level' of transparency and accountability. Singapore poses a more interesting situation. While one may say that it still evinces a firm commitment to the Crime Control model and would not go as far as promulgating publicly available prosecutorial guidelines or establishing an independent statutory Office of Public Prosecutions, it would have been a brave person to have predicted the removal of the mandatory death penalty.

This paper offers no conclusive determination on the superiority of one system over another. Each system will need to find its own balance, taking into account the values of its criminal justice system (and indeed that of society at large). It does however offer a caution. Pragmatism has thus far served Singapore well. Indeed, as Chief Justice Chan Sek Keong puts it, 'if the efficiency of a country's criminal justice system can be measured by its crime rate, then [Singapore's] is undoubtedly efficient'.<sup>579</sup> However, as the nation state matures and grows, so too will the voices that call for greater transparency and accountability. Singapore must find its 'minimum level' of transparency and accountability that society will find acceptable. It must take evolving societal demands into account but as it embarks on its new experiment, it would be wise to consider, and consider seriously, the potential cost of the move. Prosecutorial discretion is a fine

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<sup>579</sup> Chan Sek Keong, above n 301, 6 [10].

balancing act, with transparency and accountability on one side and the efficient administration of justice on the other. The preference for either one comes at the cost of the other.



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